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NATIONAL INFORMATION INFRASTRUCTURE COPYRIGHT PROTECTION ACT OF 1995

GOVDOC
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104 - 849

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

S. 1284

A BILL TO AMEND TITLE 17 TO ADAPT THE COPYRIGHT LAW TO THE DIGITAL, NETWORKED ENVIRONMENT OF THE NATIONAL INFORMATION INFRASTRUCTURE, AND FOR OTHER PURPOSES

MAY 7, 1996

Serial No. J–104–78

Printed for the use of the Committee on the Judiciary

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NATIONAL INFORMATION INFRASTRUCTURE COPYRIGHT PROTECTION ACT OF 1995

TUESDAY, MAY 7, 1996

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:12 a.m., in room SD–106, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senator Specter.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. We are happy to welcome you all out this morning to this very important hearing on the National Information Infrastructure Act.

Good morning. This is the second in a series of hearings on the National Information Infrastructure [NII] Copyright Protection Act, S. 1284. On behalf of the Committee on the Judiciary, I would like to welcome our distinguished witnesses, as well as all who have come to observe this proceeding.

I would also like to note, at the outset, that Senator Leahy, who has expressed a great interest and has been very involved in this legislation, is unable to be here due to a death in the family. Our condolences certainly go out to Senator Leahy and his whole family.

I introduced the NII Copyright Protection Act, with my distinguished colleague, Senator Leahy, as cosponsor, to begin the process of establishing the rules of the road for the information highway and the information superhighway to come. Today, an estimated 10 to 40 million Americans access the Internet and its graphic component, the World Wide Web, through online access providers, and the total of Internet users is growing by some 15 percent each month.

The range of products and services available on this digital network is amazing—electronic mail, bulletin board services, digital books, digital magazines and newspapers, computer software, sound recordings, video games, and motion pictures, just to name a few. Even Senator Leahy and I have web pages, although I haven't seen them listed under "What's Cool" lately. [Laughter.]

But what we have now is only the promise of what is to come. The information superhighway will link not only computers, but also telephones, televisions, radios, fax machines, and more into an

advanced, high-speed, interactive, broad-band digital communications system.

At the beginning of the automobile age, I am sure that a paved road elicited wonderment. Only the visionary could foresee the interstate highway system of today. To realize the potential of digital networks, we must create a legal environment that encourages more and more products and services to go online.

Despite the array that currently exists, many content providers are holding back. They are anxious about their property rights, mainly because the digital format that provides quick, easy, and economical access also facilitates massive unauthorized copying and distribution, instant and perfect copies everywhere and every time.

We must not forget that these, "content providers," are not only the big guys that some people love to hate, but also the thousands of men and women authors, composers, artists, programmers, performers, et cetera, whose creativity is rewarded through the commercial exploitation of copyrighted works. Indeed, individual creators should be as, if not more concerned than big commercial enterprises about the potential of massive digital piracy, since, for the first time, digital networks provide individual creators with the alternative of economical self-publication.

At the same time, I appreciate the balance that the Copyright Act draws between creator's rights and user's rights. Many people take to the highways for the sheer pleasure of driving and not all roads have tolls. The doctrine of fair use and the idea/expression dichotomy apply to S. 1284, as they do to the rest of the Copyright Act.

In addition, I am concerned about online access provider liability and the problem of interconnectivity. I am encouraged by the ongoing negotiations on online service provider liability, both the ones chaired by Congressman Goodlatte and the ones organized by the parties themselves. Fair use is also under discussion and I am hopeful that with both of these issues, agreement will be reached. I understand that agreement has already been reached between representatives of the visually impaired and the publishing industry.

At this hearing, we cannot hope to deal adequately with these issues and with other issues raised by the bill, such as the library exemption and copyright management information. At least one other hearing will be necessary, in my view. This hearing has been structured, however, to touch on all the major themes of the bill.

We have with us this morning a representative of a coalition of content providers and a representative of a coalition of online service and access providers. We also have a witness from a company with both perspectives. A witness from a performing rights society will bring a unique perspective to the discussion, and there will be a witness who will question the wisdom of the whole enterprise that we are talking about.

Now, I welcome all of these perspectives. I am not wedded to every word of the text of this bill, although I agree with its basic thrust. As you know, the text of the bill comes from the report of the Working Group on Intellectual Property Rights of the Information Infrastructure Task Force. It is an excellent starting point for this committee as we begin the process of fine-tuning. Indeed, I rec-

ommend the report, also called the White Paper, as valuable background material to our deliberations. In the end, however, Congress will produce its own bill and its own legislative history.

Now, at this point we have with us a distinguished member of the Commerce Committee, Senator Burns, from Montana, and we will turn to you, Senator Burns, for any comments you would care to make.

STATEMENT OF HON. CONRAD BURNS, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator BURNS. Thank you, Mr. Chairman, and good morning. Thank you for allowing me this short testimony this morning. I have a full statement, if I could put it in the record.

The CHAIRMAN. Without objection, we will put the full statement in the record.

Senator BURNS. I appreciate your leadership on this issue. As you know, whenever we passed the telecom bill and reformed the telecommunications industry, we knew by all of these new technologies that something would have to be done in order to protect the intellectual property that would be transmitted on this great new highway, and the copyright law is very important in protecting that intellectual property as we move into a global economy where business is conducted over a global information infrastructure.

However, this reform doesn't get us all the way there. There are other areas that we have to address, but I don't think I have ever seen in my lifetime the amount of opportunity that will open up to the young people who are just now entering the work force in this country because telecommunications opens many, many doors. As the Senator from Utah, the chairman of this committee, understands, in our States we have to do something to eliminate distances and this is one technology that does that. In other words, it opens up doors to our rural States, our students that go to school in our rural areas and do not have access or maybe even exposure to the educational opportunities that young people in the urban areas do.

So with that also opens up great business opportunities. No matter where you live, you will do business around the world and never really leave home. But with that, of course, comes piracy and the dangers. The unprecedented access to the exchange of information over that infrastructure exposes users to breaches of confidentiality, the destruction of their intellectual property and, of course, outright theft.

Now, while reforming the copyright laws will give companies a legal cause of action to recover for economic espionage, it will not, standing alone, prevent that espionage, and I think that is basically what we want to do. I appreciate your leadership on this. I know how interested you are because it is very, very important to our home States, but it is also important to this country because as technology turns over—and technology, as it grows and turns over, has a tendency to displace workers—we have to use that same technology for furthering education and furthering opportunities in a global economy. I appreciate your being aware of that and your leadership on this issue.

I will submit my statement and I thank you very much for allowing me to testify.

The CHAIRMAN. Well, thank you, Senator Burns. We appreciate your work in these areas. You take it very seriously and this committee is happy to have your wisdom and we will look forward to reading the whole statement. So thank you for being here.

Senator BURNS. Thank you.

The CHAIRMAN. Thank you.

[The prepared statement of Senator Burns follows:]

PREPARED STATEMENT OF SENATOR CONRAD BURNS

Mr. Chairman, thank you for this opportunity to testify before your Committee today. I believe that S. 1284, the National Information Infrastructure [NII] Copyright Protection Act of 1995, is a good first step in protecting intellectual property in the Information Age, and therefore, I support this legislation.

I believe that we are on the threshold of the Information Age—an era which promises an explosion in economic growth, technological innovation and educational opportunities that could improve the standard of living and the quality of life around the world. To achieve this promise, businesses and the Federal Government have worked together over the past several years to develop the Global Information Infrastructure [GII], the electronic pathways that will carry vast quantities of valuable commercial, scientific, educational, and personal information between individuals, companies and customers, companies and their subsidiaries, doctors and patients, and teachers and students.

While the GII offers unprecedented access to and exchange of information, it also exposes users to breaches of confidentiality, disruption of their operations, destruction of their intellectual property and outright theft. These are serious concerns, because electronic data in digital form is emerging as the most valuable currency in the Information Age. Users of the GII have the need, right, and responsibility to protect access to, and the confidentiality of, their information. They also have the right and responsibility to determine the appropriate type and strength of protection for their communications over the GII.

I believe that the only way to adequately protect intellectual property as we move into the Information Age, is to enact legislation to make present laws applicable to digital communications, and to loosen up the present trade restrictions on encryption. S. 1284 gets part of the way there.

Mr. Chairman, we all understand that copyrighted products have traditionally been sold in stores or through catalogues where a hard copy, if you will, of a book or compact disk, for example, is exchanged. That was a simple world, and copyright protection was easy then.

The difficulty of insuring that intellectual property is protected is increased when products can be posted on, and downloaded from, the Internet. I would clarify today that the copyright infringement in today's world doesn't exist because people are taking materials off the World Wide Web sites of legitimate content owners. Today, organizations like Time Warner are not putting all of their paper-world content on the Internet precisely because of the concern of protecting their intellectual property.

But content owners do understand the potential of distributing products over the Internet. And these folks also know that the issues of copyright and encryption are integrally linked. And so, in my remarks here today about this important copyright issue, I want to make sure that the Members of this Committee understand the integral link between copyright and encryption.

If I'm trying to buy an electronic copy of the Lion King movie, or a song from the soundtrack from the Lion King, how does that become a secure transaction? First, it will be important to identify myself to the vendor, so that they know that, in fact, it is Conrad Burns buying the product. One way for me to do that, is for me to give the vendor the public portion of my encryption key. The vendor then can use my public key to encrypt that song as well as the information about the time and place of purchase. Once all that information is encrypted, the only way I can play that song is to decrypt it with my private key. All the world can use my public key to encrypt something, because it is provided to the world by a certificate authority service provider, such as Verisign, Nortel, or GTE. However, only I can decrypt this transaction because only I hold my private key. So when that vendor knows it is encrypted that way, they know that only Conrad Burns will get it, because only Conrad Burns has the private key. At the point of sale, the merchant might have

encrypted that song with other information unique to that transaction (date and time, for example), and the vendor can use digital watermarks—another encryption technique—to identify a particular copy of the song to a specific purchaser. So even though a million copies are downloaded every day, each transaction can be uniquely linked to a specific purchaser.

This ability to authenticate and identify is critical for the content owner's ability to enforce their rights against infringers and pirates who misuse and manipulate electronic media. Because encryption technology can be so used, content owners can trace the pirated copy of that Lion King song back to a specific purchaser, in much the same way as the Oklahoma bombers' rental of the U-Haul truck was traced by the serial number on the truck's axle; hence, encryption brings some accountability to cyberspace.

Up until now, content owners have been faced with the dilemma of infringers and pirates who take the content from products such as books, magazines, and compact disks and electronically transferring it to files that can be accessed over the Internet. Such deliberate activity is a distinct matter but it is not unimportant. Someone can use a scanner to transfer a Playboy centerfold, for example, to a bulletin board system, which then can be accessed by individuals "surfing" the Internet. This theft of protected property is illegal, of course. We might not be able to change the behavior of these criminals, but I do believe that there are ways for providers of Internet and on-line services to cooperate with content owners to remove such infringed products and pirated materials with proper notice in an appropriate fashion that is far more reasonable than litigation; and who knows, maybe someday soon, we'll be able to trace these lawbreakers.

So why am I talking about encryption when we're considering copyright? I think that it's clear: you can't really have one without the other, and without encryption, you certainly can't have dynamic electronic commerce.

Mr. Chairman, last week, a number of us cosponsored a bill on the subject of encryption which would loosen outdated export controls and help insure that American software and hardware companies can retain their preeminence in the world. Encryption is a very difficult issue for members of this committee, and for all of us in Congress. But when I think of books and compact disks and the potential for electronic commerce over the Internet, I also think of companies doing research and development which will lead to product development, sales and job creation. And today, content owners, like multinational companies, cannot be sure that their intellectual property is being protected. They cannot be sure that the products being developed in the labs are not being stolen by foreign countries once the plans are sent electronically (i.e., digitally) to their foreign subsidiaries. The whole argument about economic espionage has not gone unnoticed: our law enforcement officials know that there are dozens of foreign countries who send their spies into this country to steal our R&D and our next generation of products. This is a critical issue in this country. We all want to work very closely with the law enforcement agencies and the NSA in a balanced way as we grapple with assuring adequate security in our communications. Let us think very carefully about a balanced approach to this issue. Let us not unfairly penalize U.S. companies who happen to make encrypted software or hardware. Such products are a part of the solution, not the problem.

I hope that we can enact both the legislation presently before this Committee and the legislation to loosen the trade restrictions upon companies who manufacture encryption software and hardware. By doing so, we will prevent billions of wasted dollars in unnecessary litigation, we will save hundreds of billions of dollars in what would otherwise be lost revenue, and we will save millions of jobs. Mr. Chairman, thank you for the opportunity of testifying before you here today.

The CHAIRMAN. We will now turn to our other witnesses. Our first witness is Mr. Kenneth Kay, the executive director of the Creative Incentive Coalition, or CIC, whose membership includes representatives from a broad array of copyright industries, including the motion picture and recording industries, television and cable networks, and publishers of software, music, books, newspapers and magazines. Mr. Kay also served as counsel to the Judiciary Committee for a number of years and we are pleased to have him here with us today. We are glad to have you here. Mr. Kay will give us a multi-media demonstration of some of the issues that will be discussed here today.

After the demonstration, we will hear from Mr. John Bettis. Mr. Bettis is an Emmy Award-winning lyricist who has also been nominated for the Academy, Golden Globe, and Grammy Awards. His works have sold more than 180 million records and have been sung by such popular artists as Michael Jackson, Madonna, Diana Ross, Whitney Houston, Karen Carpenter, Harry Connick, Jr., Julio Iglesias, Dolly Parton, and others. He has served as the chairman of the board of the National Academy of Songwriters from 1986 to 1987 and currently serves on the board of directors of the American Society of Composers, Authors and Publishers, ASCAP.

We are really happy to have you here, Mr. Bettis.

Mr. BETTIS. Thank you.

The CHAIRMAN. We recognize the tremendous achievements you have made through the years.

Mr. BETTIS. Thank you, Senator.

The CHAIRMAN. Following Mr. Bettis, we will hear from Mr. William Burrington, who is here on behalf of the Ad Hoc Copyright Coalition, an unusual coalition of regional Bell operating companies, long distance companies, online service providers, Internet access providers, software companies, and corporate computer network users. Mr. Burrington is also the assistant general counsel and director of public policy at America Online, Inc. Mr. Burrington, I am told, will also do a multi-media presentation.

Mr. BURRINGTON. Yes.

The CHAIRMAN. All right. That is one of the nice things about chairing this committee. I get to see some good presentations here.

We will then be pleased to hear from Prof. Robert Oakley, who will testify on behalf of the Digital Future Coalition, the DFC. The DFC consists of 27 member organizations from the information, technology and educational sectors, including a broad array of library associations. For the past 13 years, Professor Oakley has been the director of the law library and a professor of law at the Georgetown University Law Center. So we are honored to have you here, Mr. Oakley, and look forward to your testimony.

Mr. OAKLEY. Thank you, Senator.

The CHAIRMAN. Our final witness will be Mr. Daniel Burton, vice president of Government Relations for Novell, Inc.—very important to me because Novell is based in Orem, UT, but I think very important to the country. Novell employs over 5,000 people and is the world's leading network software provider. Mr. Burton joined Novell in 1995. Prior to that, he served as president of the Private Sector Council on Competitiveness. He is a member of the Council on Foreign Relations, a member of the board of directors of the Software Publishers Association, and chairman of the Policy Committee of the Business Software Alliance.

We are especially pleased to hear from Mr. Burton today in that Novell is both a software publisher and a provider of key infrastructure components of the Internet. After having heard from the content providers and the online service and access providers, we will be especially interested in hearing from someone who has a foot in both camps.

So, Mr. Kay, we are pleased to hear from you now. Now, we are going to ask the witnesses to limit their comments to 5 minutes. The media presentations, I understand, will take—one will take

about 8 minutes and the other may be shorter, but I would like you to watch these lights. When that red light comes on, I would like you to wind it up very quickly so that we can get through this today. I am due on the floor in 5 minutes, but hopefully I have got that covered. But I could be called away at any time and I would like to hear as much as I can.

So, Mr. Kay, we will turn to you.

PANEL CONSISTING OF KENNETH R. KAY, EXECUTIVE DIRECTOR, CREATIVE INCENTIVE COALITION, WASHINGTON, DC; JOHN BETTIS, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, LOS ANGELES, CA; WILLIAM W. BURRINGTON, ASSISTANT GENERAL COUNSEL AND DIRECTOR OF PUBLIC POLICY, AMERICA ONLINE, INC., VIENNA, VA; ROBERT L. OAKLEY, DIGITAL FUTURE COALITION, WASHINGTON, DC; AND DANIEL F. BURTON, VICE PRESIDENT OF GOVERNMENT RELATIONS, NOVELL, INC., OREM, UT

STATEMENT OF KENNETH R. KAY

Mr. KAY. Mr. Chairman, thank you so much. Thank you for holding this hearing and for your outstanding leadership on this issue, and thank you for inviting the Creative Incentive Coalition.

The Creative Incentive Coalition is made up of 25 trade associations and companies from a broad range of creative copyright holders, and the unique nature of the Creative Incentive Coalition allows us to do a very special kind of demonstration this morning, which is that we are going to show the current state of piracy across a range of mediums represented by our broad and diverse membership. The purpose of our demonstration is to really show that piracy is easy, it exists today, it will get easier, and it costs jobs.

Our demo is a reenactment of a trip through the Internet. Any Internet user can visit the sites we will see today. You can understand we are not going to disclose the specific locations of those sites because we don't want to unnecessarily publicize infringing material, but we also want to educate the committee on the piracy that is out there.

All you need to commit this piracy today is a personal computer, a telephone modem, Internet access and software; $1,200 will get you to the Internet if you use your own equipment. If you are using equipment in school or at a business, it doesn't cost you anything, and just three or four clicks, which takes no more than 2 minutes, and you are on the Internet.

We have just turned on our computer and we are selecting an Internet browser to help us navigate from site to site. We are now on the Internet. Keep in mind that an individual is making individual decisions about where to go. They can go to legitimate sites, they can go to illegitimate sites, and we are using a browser to decide where we want to go.

Today, we are going to start our tour with a visit to the software industry. Many software companies today are beginning to use the Internet as an economic platform to advertise, market, and sell

their products. So we thought it was appropriate to start our tour at a legitimate site which is being used to exhibit and sell products.

We are now in California at the LucasArts home page. LucasArts is a California company of 200 employees that produces "Dark Forces," a popular video game based on "Star Wars." This is the hard copy version of the product. This page is a very, very interesting page because there has been a lot of criticism that this legislation may cut down on browsing on the Internet. This is an example of cyber browsing or cyber window-shopping.

The company has determined to make its materials, in part, available for free demonstrations, and so we are in here now and we can choose one of the demonstrations and here we are looking at one of the demos and we can play on it. If we like it, we can then go to the company store. So it is very important that we have started our tour on a legitimate site because we have browsed, we have played, and if we wanted to, we have purchased a product.

These are parts of the Internet vision of the future that many of us have in mind and these are the kinds of shops that we hope will proliferate if the right signals are sent. But we are now going to head toward the kind of Internet activity that is more troubling and that could undercut this vision.

For this part of the journey, we once again use a search engine and we are going to try to find the very same material, but in a pirate web site. We have just conducted an Internet search for "Dark Forces" and ended up at an FTP site, file transfer protocol. This site contains copyrighted materials without the permission of LucasArts, and if you look on the screen, the third entry down is the same material, "Dark Forces." An individual can download the creative material of LucasArts and the 200 employees of LucasArts are substantially undercut by this presentation. The Software Publishers Association is currently investigating this site.

Now, we are using an Internet browser to land at what is called the Usenet Use Group. This site exists in many, potentially thousands of locations simultaneously. It is a gathering point for software pirates. Here, an individual has the ability to obtain close to 2,000 individual pirated pieces of software. That 1971 there is not the date. That is the number of free pieces of software that are available on that site.

Here, we can download Perfect Office 3.0, which is a legitimate product of Corel that has 600 employees based in Utah. The product retails for about $500. We were able to download this program, which is the crown jewel of that company, in 15 minutes. In a few years, we would be able to get it almost instantaneously.

Like the software industry, Internet piracy in the publishing industry is here today. The text of an entire book can be downloaded in a matter of minutes. We are now going to the fan club of an internationally well-known science fiction author. We are now in Finland at the Silliland Space Agency home page. This site belongs to a fan of Douglas Adams, the best-selling author of the "Hitchhiker Guide to the Galaxy" series. I have a copy of the popularly available novel here.

In principle, the notion of this home page cuts both ways. It is a fan who is very devoted to this author and wants to talk with other similar fans about the work of the author. That kind of activ-

ity is a legitimate activity and should be encouraged. It accrues to the benefit of the fan and the author, but when we go to the next page, we step over the line and we are now into conduct that undercuts that creative activity.

We are now on a page in which each of those five pink dots represents the ability to download the entire text of this author's books. We have there half his life works on that screen. The first bullet is the 216 pages represented by this volume. In 9 minutes, we were able to completely download these 216 pages. In addition to this complete set of books, the site operator also offers a pirated copy of the video game, "Hitchhiker's Guide." Ballantine Books, the publisher and the copyright owner based in New York with 200 employees, plans on taking action to stop this infringement.

Now, when most of us think about piracy today, we think of the kinds of products we have just seen, but there is another creative industry that is under assault currently, the psychological and educational testing industry. This industry prepares, supervises, and updates all forms of testing for our society, including employee testing, college board testing, psychological testing for FBI and police forces.

We are now headed to a site in southern California. We are looking at a pirated version of a psychological exam related to drug abuse. The legitimate owner of the exam is the University of Minnesota, who licensed its product to NCS Assessment, a small company in Minneapolis with 140 employees whose CEO is here with us today. The exam costs $40 and cost $3 million to put together entirely. It took less than 5 minutes to download the entire exam, and in a few years you could download it instantaneously.

Finally, we want to give you a foreshadowing of the future in the music and film industries. We are now headed to a site in a midwestern State which is the home page of a fan of Mariah Carey. We can choose one of her songs and we are about to see Mariah and Boyz II Men singing "One Sweet Day." The copyright owner is Sony Music Entertainment, a company based in New York with 10,000 employees. Sony did not authorize this clip and is currently investigating it.

[Videotape shown.]

Mr. KAY. This 60-second clip took 20 minutes to download. In a few years, you would be able to download perfect-quality sound recordings and music videos in seconds.

For our last site, we are now headed to the home page of a "Star Wars" fan where we will get a glimpse of what is around the corner for piracy in film. This site is in Denmark. It is the unauthorized clip from "Return of the Jedi." Lucas Film, a company in California with 160 employees, is the copyright owner.

[Videotape shown.]

Mr. KAY. This 30-second clip took 30 minutes to download and one day a pirated version of the entire film, "Return of the Jedi," would be available in minutes.

We have now seen pirated versions of a film clip, music video and employee tests, the text of an internationally acclaimed science fiction novel, and business and entertainment software. We have summarized where we are today. Much damaging piracy is occurring today; much more is likely to come.

In summary, Mr. Chairman, we would simply say that the Congress needs to send a signal to the digital community about the kind of activities that are going on. I will not spend any more time specifically linking your legislation to this problem, but in closing just let me say that we believe very strongly that S. 1284 is the kind of signal that needs to be sent and therefore we are strongly supportive of your legislation on that basis. We look forward to working with you in the months ahead to perfect that legislation.

Thank you very much.

The CHAIRMAN. Well, thank you so much, Mr. Kay.

[The prepared statement of Mr. Kay follows:]

PREPARED STATEMENT OF KENNETH R. KAY

Chairman Hatch, and members of the Judiciary Committee. The Creative Incentive Coalition (CIC) appreciates this opportunity to present the views of the copyright industries on S. 1284, the National Information Infrastructure Copyright Protection Act.

CIC strongly supports the thrust of S. 1284. We commend Senators Hatch and Leahy for their leadership in introducing this important bill, and thank the Judiciary Committee for holding timely hearings on it.

CIC is a broad-based coalition representing all major sectors of the copyright-based industries, including leading producers, publishers and distributors of copyrighted material in the form of text, music, audio, video, computer programs and multi-media. CIC's members came together in 1994 to preserve the "incentive to create" embodied in our copyright system, and to improve public understanding of the importance of copyright, especially in digital networked environment, to our economy and our society. A list of CIC members is attached.

The copyright industries play an increasingly important role in the U.S. economy, and in our national competitiveness in the global marketplace. In 1993, the most recent year for which complete statistics are available, the U.S. copyright industries accounted for 3.7% of the U.S. Gross Domestic Product, employed three million American workers, and racked up foreign sales of $45.8 billion. Today's Internet, and tomorrow's more advanced digital networks, offer exciting opportunities for even broader and more efficient distribution of the fruits of American creativity, both here and around the world.

But the same technological advances that open up these new opportunities also underscore the vulnerability of our copyright industries to new forms of piracy and other abuses of intellectual property rights. This vulnerability will cloud the bright prospects and undermine the exciting potential of the National Information Infrastructure (NII) and the Global Information Infrastructure (GII), unless we succeed in using law, technology and public education to promote a more favorable climate for intellectual property in cyberspace. The legislation before you this morning is a crucial first step toward advancing that goal.

Our written statement is in three sections. The first summarizes why CIC believes that prompt enactment of NII copyright legislation is so important. The second section accompanies a graphic demonstration of the threat of copyright piracy on today's Internet, a threat that we believe could be even more serious on tomorrow's more robust and ubiquitous networks. Finally, we will offer brief comments on several important issues that have arisen in the debate over the NII Copyright Protection Act.

I. THE TIME FOR A COPYRIGHT "DIGITAL UPDATE" IS HERE

S. 1284 is based on two premises with which CIC fully agrees: First, strong protection for intellectual property is essential if the full potential of the National Information Infrastructure is to be realized; second, current copyright law, with a few important amendments, works well to provide that protection.

The Hatch-Leahy bill provides the "digital update" the Copyright Act needs to maintain its full effectiveness in the digital network environment. The changes it would make in current law are modest, but important. Beyond the specific statutory changes contained in the bill, however, prompt enactment of this legislation will help unlock the full potential of advanced digital networks, in at least four ways.

First, it will send a powerful message, both within the United States and throughout the global marketplace, that respect for intellectual property is a fundamental

"rule of the road" on the information superhighway. As our brief survey of Internet piracy will show, that fundamental rule is too often disregarded today.

Second, the Hatch-Leahy bill will help stimulate and encourage research and development on new technology to protect copyrighted works from infringement, and on new systems to facilitate and automate the management of copyrights. These are key enabling technologies for the success of advanced digital networks.

Third, enactment of the NII Copyright Protection Act will give a strong boost to efforts to educate members of the public—in their roles as consumers and as creators of works of authorship—in the importance of respect for copyright. This is essential if the goal of promoting electronic commerce on digital networks is to be realized.

Finally, modernization of our law will provide a valuable model to other countries, and to international organizations such as the World Intellectual Property Organization, as they grapple with the challenge of adapting copyright norms to the Global Information Infrastructure. The whole world is looking to America for leadership on this crucial issue. S. 1284 seizes that critical opportunity.

II. PIRACY ON THE INTERNET—THE REALITY AND THE THREAT

Mr. Chairman, during the past year, the U.S. copyright-based industries suffered an estimated $18–20 billion worth of copyright piracy around the globe. The growth and expansion of the Internet offer the chilling prospect of an exponential increase in that figure. The new distribution mechanisms of the National and Global Information Infrastructures could spawn a new breed of copyright pirate: more technologically sophisticated, harder to detect, and far more mobile, able to distribute unauthorized products around the world from any convenient safe haven.

But copyright piracy on the Internet is not just a future threat. It is a present reality. Our demonstration this morning will document just a few of the many Internet sites on which the intellectual property rights of American copyright owners are being flagrantly violated—today. The operators of these sites have copied the creative works of others—books, test materials, music, sound recordings, movies, videogames, computer software—and made them available, without authorization, without compensation, and, in many cases, without effective recourse. Of course, these sites are a pale shadow of the cyberspace pirate dens that could infest the more robust global digital networks of the future. In the sites we will tour today, one can read the blueprints for a massive structure of cyber-piracy that could blight the future of America's creators.

CIC believes that these sites demonstrate why Congress must send the message of respect for intellectual property rights; why research and development of technological solutions must be accelerated; why public education in respect for intellectual property is so desperately needed; and why the U.S. must lead the way toward stronger global protection. In short, these sites underscore the need for prompt enactment of the Hatch-Leahy bill.

III. ISSUES IN THE DEBATE OVER S. 1284

S. 1284 is important, not only because of the changes that it would make in copyright law, but also because of the important copyright doctrines that it would leave undisturbed. In outline form, the bill would:

Clarify that copyright owners have the exclusive right to distribute copies of works by transmission over computer networks—even if no physical copy of a book, CD, video or diskette changes hands.

Broaden existing exceptions to copyright protection to allow some digital copying by libraries, and preparation of certain editions for the blind, without the permission of the copyright owner.

Outlaw devices and services that break encryption or circumvent other technologies designed to protect copyrighted materials from unauthorized copying or transmission.

Forbid tampering with or falsifying digital tags and other information identifying the ownership of copyrighted materials.

Just as importantly, S. 1284 would make no change in other important copyright rules, such as:

The First Sale Doctrine, which determines when owners of copies of works may distribute those copies, without obtaining permission from the copyright owner;

The Fair Use Doctrine, which outlines factors for determining when works can be copied or otherwise used without permission for educational, research and other purposes.

As noted above, CIC strongly supports the overall thrust of S. 1284. At this point we offer the following comments on a few issues which have stimulated debate dur-

ing the consideration of this legislation. We would be glad to provide more detail on any of these points in order to assist the Committee in acting on this legislation.

1. Online service provider infringement liability

No question related to this legislation has stimulated broader debate than this: should existing standards of copyright liability be changed to reflect the circumstances of online service providers (OSPs), Internet service providers (ISPs), and other participants in new digital networks? The Administration's White Paper answered this question "no"—or, at least, "not yet". S. 1284 as introduced reflects the same answer. It would make no change in copyright infringement liability standards, under which online service providers and others are accountable for their own infringements, and may, in some circumstances, be held responsible for copyright violations committed by their agents, customers, or users.

This is not a new issue for CIC. Even before the White Paper was issued last year, we had identified the critical importance of this issue. The question addresses the proper allocation of legal responsibility in a marketplace in which virtually all CIC members have become deeply involved. Initially, our members were mostly content providers, using online services to distribute copyrighted material to growing markets. Increasingly, CIC members have added the role of participation in the operation of these services themselves. Because of this overlapping and accelerating convergence of roles, CIC has long recognized that content owners, OSPs and ISPs share a common interest in promoting respect for intellectual property in the online networked environment, and a common goal of preventing copyright infringement on networks to the greatest practical extent.

Spurred by this recognition, CIC reached out last summer to the major commercial OSPs and began a dialogue with them on issues of mutual concern. Our numerous joint meetings covered a broad range of complex issues, and, we believe, were useful to participants on both sides of the table. Recently, that dialogue was superseded by a more formal negotiation process convened under the auspices of the Courts and Intellectual Property Subcommittee of the House Judiciary Committee, and chaired by Representative Bob Goodlatte.

CIC fully supported this forum. Seven companies or trade associations belonging to CIC were appointed as official participants in this roundtable, in either the "content providers" or "hybrid" group; several others had the status of alternates. Along with our colleagues representing service providers and the educational and library communities, CIC members have devoted literally hundreds of hours to detailed discussions of issues of liability, responsibility, and sound business practices. These meetings are ongoing, even though the formal process convened by the House subcommittee has been terminated.

While CIC members are disappointed that these exhaustive discussions have not yet culminated in a consensus, we believe they have been productive and have helped forge a greater shared understanding of the challenge of protecting copyrighted materials in the online environment. The lack of a consensus, despite ample evidence of good faith and cooperation among the participants, is understandable. The issues—legal, technical, and business—are inescapably complex; the stakes are high; and the daunting pace of change threatens to make any proposed solution rapidly obsolete. The pervasive dynamism of this environment may be the most formidable challenge facing any effort to write into federal statute new copyright infringement liability standards for OSPs and ISPs. In the meantime, we commend the Committee for its decision to move the legislative process forward on those important issues addressed by S. 1284 that are ripe for resolution at this time.

2. Prohibition on protection circumvention devices/services (section 1201)

As Congress takes the first steps along the road toward adapting copyright law to the digital networked environment, few missteps could be more dangerous than failing to provide copyright owners with adequate legal tools to protect and enforce their rights. New technology offers intriguing new opportunities for doing this, but this technology cannot possibly succeed in a legal vacuum. Copyright owners who choose to place their copyrighted works in protective envelopes, or to protect them through electronic locks, must have recourse against those who make it their business to traffic in technology to steam the envelopes open or to pick the locks. Furthermore, an important goal of this legislation is to stimulate more research and development into a variety of competitive technological solutions to the problem of network piracy.

For these reasons, a legal prohibition on trafficking in circumvention devices or services, such as the one contained in proposed new section 1201, is an indispensable feature of S. 1284. CIC strongly supports the thrust of this provision, but recognizes that it could be improved. Criminal penalties should be made available in

appropriate, serious cases in which copyright pirates exploit protection-defeating technology. Additionally, the "primary purpose or effect" test should be carefully examined so that it can be made clearer and more susceptible of proof. CIC looks forward to working with the Committee to evaluate specific proposed amendments in this area.

Congress is not writing on a blank slate here. The Audio Home Recording Act of 1992, outlawing circumvention of a specific copy management technology, is one precedent for proposed section 1201. Another is the satellite signal piracy provision of the Communications Act (47 USC 605(e)(4)), which applies to devices or equipment that are "primarily of assistance" in overcoming any kind of scrambling that the satellite cable programmer chooses to employ. Whatever formulation is ultimately adopted must give copyright owners strong and flexible legal tools to crack down on sophisticated high-tech pirates, who may traffic in a variety of protection-defeating technologies.

3. Copyright management information

As a practical matter, many of the most challenging copyright problems presented by the new digital networked environment can be substantially ameliorated by innovative uses of technology. Advanced copyright management information (CMI) systems have the potential to make it inexpensive and easy for copyright owners to securely label works on the information superhighway with ownership information, and to offer network users the opportunity to license specified uses of these works efficiently. The Hatch-Leahy bill wisely recognizes that such voluntary copyright management systems, which could take a wide variety of forms, need legal protection against those who might choose to tamper with them or misdirect the revenue streams generated by automated licensing procedures.

CIC strongly supports the goal of this provision (proposed section 1202), and looks forward to working with the Committee, with the Register of Copyrights, and with other parties, to refine and improve it. For instance, the list of prohibited activities under this provision must be carefully examined to ensure that it is focused more precisely on conduct that poses the most serious threat to the development and deployment of CMI systems, and that interference with well-established business practices in the copyright industries is minimized.

4. Library exemptions

CIC supports the intent of S. 1284's proposed amendment to section 108 of the Copyright Act. The Copyright Office, in its testimony before the House subcommittee, proposed an amendment to the bill to clarify that the expanded exemption to allow some digital copying by libraries applies only to archival and preservation activities, not to distribution. CIC supports the approach of this amendment, in principle. It is important to ensure that any revisions to section 108 of the Copyright Act do not undermine the right of copyright owners to control electronic distribution of their works.

5. Publication

As part of its overall support for clarifying exclusive rights over distribution of copyrighted materials by transmission, CIC supports the expanded definition of publication, even though, as the White Paper points out, it may have some negative effect on copyright owners in some circumstances. If some works that are only distributed online are defined as published, they will become subject for the first time to the requirement of mandatory deposit of copies with the Library of Congress (LC) under 17 USC 407. This could create some practical problems, both because the LC would be obtaining copies of this material without having agreed to license restrictions applicable to all other recipients (including other libraries), and because LC may not be in a position to efficiently add all this material to its collections, which is the legal justification for the mandatory deposit requirement. CIC urges that these practical issues be accommodated in the timing and implementation of the expansion of the mandatory deposit requirement flowing from the new definition of "publication."

6. Exceptions for visually impaired

CIC supports the substitute provision negotiated among the groups representing the visually impaired, publishers, Library of Congress, and other interested parties, and presented at the House hearing on February 8.

7. Criminal infringement

The decision of the U.S. District Court in *U.S.* v. *LaMacchia*, 871 F.Supp. 535 (D. Mass. 1994), is widely perceived as opening a serious loophole in the criminal infringement provisions of the copyright law. In the NII environment, a new breed of

copyright pirates has arisen, who use bulletin board services and other techniques to make valuable unauthorized copies of works available to others, but cannot themselves be proven to have reaped a profit from doing so. An amendment to S. 1284 would be an appropriate means for plugging this loophole, which the White Paper identified as "a serious lacuna in the criminal copyright provisions." Indeed, without fixing the LaMacchia problem, the goal of providing a solid basis for protecting intellectual property rights in cyberspace cannot be fully achieved. A legislative response to the LaMacchia decision could be modelled on S. 1122, introduced by Senators Leahy and Feingold with the backing of the Justice Department, which authorizes criminal prosecution of serious online piracy without the necessity to prove the defendant's "commercial advantage or private financial gain," or on Title XIV of the Kyl-Hatch-DeWine anti-crime bill (S. 1495), which takes a similar approach.

8. Fair use

CIC believes that the decision, reflected in the text of S. 1284, to preserve the current statutory provisions on fair use was a wise one. Nothing in the legislation either expands or diminishes the fair use privilege as reflected in section 107 of the Copyright Act. We also believe that the deliberations of the Administration's Conference on Fair Use (CONFU), and of some of the satellite fora dedicated to particular fair use issues, such as the Fair Access Working Committee of the Consortium of College and University Media Centers (CCUMC), have been valuable and productive. Many CIC members have joined with a broad spectrum of educational, library, and public interest representatives in participating actively in these fora, some of which have made substantial progress toward the adoption of new fair use guidelines. These efforts should be supported, not short-circuited by legislation to alter the current statutory balance in this sensitive area.

9. Other issues

Finally, in the comments on the White Paper and during the House hearings, a variety of concerns were raised concerning the impact of the legislation on browsing of copyrighted materials, the first sale doctrine (currently embodied in section 109 of the Copyright Act), and instructional uses of copyrighted materials in distance learning (as currently governed by section 110 of the Copyright Act). While many of these concerns float unmoored to specific statutory proposals, some have been embodied in suggested amendments presented by the Digital Future Coalition. CIC offers a few brief observations on these issues.

First, it is important to emphasize that S. 1284 would not change the current Copyright Act in any of these areas. The proponents of change—for instance, those who agree with the Digital Future Coalition that the scope of the fundamental exclusive right of reproduction needs to be sharply cut back—bear a heavy burden of showing precisely how current law frustrates the purposes of copyright law.

Second, measured by the yardstick of practicality, many of the "solutions" propounded for the "problems" identified come up short. Take, for instance, the idea that the first sale doctrine ought to be modified to allow one who receives a copy of a work through an electronic transmission to copy and forward it without limitation, so long as one "immediately"—or, in the DFC's formulation "at substantially the same time"—destroys the first copy one originally received. As a practical matter, this solution seems completely unworkable, and would be virtually impossible to enforce.

Finally, the real solutions to these questions will be developed by information producers and consumers engaged in electronic commerce, not by copyright scholars, lawyers, or legislators who might seek to map out, in advance, the unexplored terrain of tomorrow's information marketplace. Today, copyright owners large and small already provide for a great deal of "browsing" of copyrighted materials on the Internet. Even though in some cases that "browsing" may constitute a technical violation of copyright, it is being embraced by many copyright owners as part of the practical marketing and rational exploitation of their works in this evolving new electronic marketplace. Similarly, powerful and flexible new copyright management information systems could foster a clearer demarcation of which rights, if any, the owner of copyrighted materials wishes to assert in a specific networked environment. Development and propagation of these systems, and associated protocols for granting or disclaiming rights, would be a much more constructive response to this issue than declaring that the rights the law now provides to copyright owners should not apply to the networked environment in the future.

Clear legal ground rules are indispensable to the further growth of flexible, realistic business practices in this new environment. Providing those clear legal ground rules for electronic commerce in works of authorship is what S. 1284 is all about.

The Creative Incentive Coalition commends the sponsors of the NII Copyright Protection Act. S. 1284 takes the right path in adapting copyright law for the digital age. It sets the right tone in stressing that the NII and GII can only realize their potential if intellectual property rights are respected. And it comes before the Congress at the right time to make a positive difference in the development of electronic commerce on advanced digital networks. We look forward to working with the members of the Judiciary Committee to improve this legislation and to move it forward to prompt enactment. Thank you for the opportunity to present the perspective of the copyright industries on the NII Copyright Protection Act.

Association of American Publishers.
Association of Local Television Stations.
Association of Test Publishers.
Business Software Alliance.
Cox Enterprises.
General Instrument Corporation.
Information Industry Association.
Information Technology Industry Council.
Interactive Digital Software Association.
International Business Machines Corporation.
Magazine Publishers of America.
The McGraw-Hill Companies.
Microsoft Corporation.
Motion Picture Association of America, Inc.
National Cable Television Association.
National Music Publishers' Association.
Newspaper Association of America.
Recording Industry Association of America.
Seagram/MCA, Inc.
Software Publishers Association.
Time Warner Inc.
The Times Mirror Company.
Turner Broadcasting System, Inc.
West Publishing Company.
Viacom Inc.

CREATIVE INCENTIVE COALITION,
Washington, DC, May 31, 1996.

Hon. ORRIN HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: On behalf of the Creative Incentive Coalition (CIC), I am pleased to submit responses to written questions posed by you and other Senators with regard to the May 7, 1996 hearing on S. 1284, the NII Copyright Protection Act of 1995.

CIC takes this opportunity to thank you for introducing this important legislation, and for providing us with the opportunity to testify on it. If we may assist you, your Judiciary Committee colleagues, or the staff in any way in the further consideration of S. 1284, please do not hesitate to call upon us.

Sincerely yours,

STEVEN J. METALITZ,
Smith & Metalitz, L.L.P.,
Counsel to CIC.

RESPONSES OF CREATIVE INCENTIVE COALITION [CIC] TO WRITTEN QUESTIONS OF SENATE JUDICIARY COMMITTEE MEMBERS, MAY 31, 1996

QUESTIONS FROM SENATOR HATCH

Question 1. Some have suggested that an effective way of insulating online service providers from liability for infringements on their networks would be the purchase of blanket licenses. I understand that some online service providers have already done so. Is this an effective means of providing protection for both online service providers and copyright owners? Can you estimate for the Committee the cost of such licenses and indicate what effect they might have on the average cost of a subscription to an Internet service?

Answer 1. Outside the online environment, blanket licensing and collective administration of rights have been valuable features of copyright licensing systems, in certain sectors (e.g., the licensing of public performance rights in musical composi-

tions). However, these techniques have not proven appropriate in many other kinds of copyright licensing. The same situation is likely to obtain with regard to licensing for use of works online. Blanket licensing could be part of the solution in some sectors, but is not an overall answer to the problem of preventing copyright infringement online. For example, blanket licensing would not be a viable solution for audiovisual works, whose effective marketing depends upon the copyright owner's ability to maintain control over the sequence and timing of release of the work in various markets, including through delivery online. A blanket licensing arrangement would not provide the needed flexibility in this field. Nor would it be a viable solution for licensing the exploitation of sound recordings. CIC has no information on which to base an estimate of the costs of blanket licenses for online service providers.

Question 2. Bookstore patrons are free to browse through books on the shelves in order to decide which, if any, they wish to buy. Under S. 1284, will Internet patrons be able to browse in cyberspace in the same way they can in a bookstore?

Answer 2. Yes. Both in cyberspace, and in a bookstore, patrons may browse works to the extent that the copyright owners and/or distributors of copyrighted materials have chosen this as a strategy for marketing their products. In a bookstore, such browsing, which does not involve any reproduction of copyrighted material, is very commonly, but not invariably, allowed or encouraged. (For example, shrink-wrapped books cannot be opened for browsing.) In cyberspace, where browsing is more likely to involve the exercise of one or more exclusive rights, more and more copyright owners choose to provide for browsing. These copyright owners allow, expect, and encourage network users to copy portions of copyrighted works for their own personal interest.

For example, a growing number of book publishers make first chapters or other excerpts from novels and other books freely available on their World Wide Web sites. Similarly, entertainment software producers often make beginning levels of their games available online in a similar manner. In both cases, this increasingly common marketing decision is aimed at stimulating interest in a copyrighted work and encouraging purchase of a complete copy. Although "browsing" is an imprecise term, which has taken on new meanings in popular parlance with the growth of the Internet, it appears to be a well-established commercial practice in the evolving online environment. This has occurred through voluntary decision by copyright owners, not through any change in copyright law.

Question 3. As you know, the first sale doctrine allows a book owner to give his/her book to someone else without infringing on the public distribution right. After this transaction, there is no copy in the hands of the transferor. If this is done on the Internet, however, there is an electronic copy in the computer of the transferor and an electronic reproduction is made in the transferee's computer. Both the Register of Copyrights and the Commissioner of Patents and Trademarks opined at our last hearing that this phenomenon would preclude the first sale doctrine from operating in cyberspace. Is there any way that we can preserve the first sale doctrine in cyberspace?

Answer 3. The first sale doctrine is inapplicable, in cyberspace or anywhere else, to any transaction which involves making an unauthorized copy of a protected work. (Of course, if the copying is authorized, or if it constitutes a fair use or falls within another exception to protection, the copying may not lead to infringement liability, without regard to the first sale doctrine.) The first sale doctrine remains applicable, in cyberspace or anywhere else, to a transaction in which possession of the authorized copy or phonorecord involved changes hands, without a copy being made. Thus, someone who transfers a computer diskette, or his or her computer, including the hard drive, to another, may thereby distribute a copy of a work that is contained on the diskette or hard drive without authorization, so long as the other conditions and limitations of the first sale doctrine, as codified in section 109, are respected.

Question 4. I know the Digital Future Coalition has proposed a cyberspace first sale rule which allows a possessor to pass a copy to someone else if she deletes her copy at "substantially the same time." Is it possible for such a rule to be enforced without significant incursions on privacy? How does one determine the outer bounds of the "substantially the same time" requirement?

Answer 4. CIC believes that the Digital Future Coalition's proposal to expand the first sale doctrine is impractical and unenforceable. Two of our major objections are suggested by your question. First is the definitional problem: what constitutes a deletion at "substantially the same time" that the copy was made and transferred? Second, how can the copyright owner determine the particulars of the transfer, and whether and when the deletion was made, without intruding unacceptably upon the privacy of network users? Because of these definitional and enforcement problems, the practical result of adoption of this proposal would be to eviscerate the reproduc-

tion right by allowing essentially unlimited reproduction for the ostensible purpose of transferring copies to other network users.

Question 5. In the recent *Netcom* decision, the court stated that imposing direct infringement liability on an Internet access provided who simply sets up "a system that automatically and uniformly creates temporary copies of all data sent through it" and automatically retransmits those copies to other servers would be unworkable since it "would hold the entire Internet liable for activities that cannot reasonably be deterred." Would you comment on whether this is an appropriate assessment of the impact of strict liability for direct infringement on the Internet access providers? Could you suggest what standard of liability should apply to online service providers for infringements upon their users? Should there be different standards for those who are simply "open pipes" as opposed to those who provide additional services?

Answer 5. Many CIC members would question many aspects of the *Netcom* decision, including its exclusion of direct infringement liability for acts that take place "automatically" and "without human intervention." (Even if the *Netcom* court reached the right result on direct infringement claims in that case, this rationale is troubling, since even "automatic" processes are the result of programming decisions that can ultimately be traced back to a human source.) However, the fact that a federal court, after serious consideration of the applicable liability standards under current law, absolved the Internet access provider of any liability, as a matter of law, for direct or vicarious infringement, says something about the flexibility of current law, and should be considered in gauging the need for statutory change in this complex area.

As noted in CIC's written testimony, many CIC members are deeply involved in the online service industry, either as operators of services and/or as content providers who use these services to distribute material to growing markets. Furthermore, we have long recognized that content owners and online service providers (OSPs) have a strong common interest in promoting respect for intellectual property in the online networked environment, and a common goal of preventing copyright infringement on networks to the greatest practical extent. If infringement liability standards are to be changed or clarified in this area, those changes and clarifications should maintain adequate incentives for all network participants to cooperate in achieving this common goal. It is certainly appropriate to consider different liability standards for those entities that serve merely as conduits for the dissemination of infringing materials. However, a blanket immunity would be justified only for a narrow category of providers, such as those who do no more than provide the physical infrastructure over which the material passes. Legal incentives must be maintained for value-added services, and for entities that can play a constructive role in preventing and combatting infringements, by, for example, blocking access by their customers to piracy-infested sites.

Question 6. Are copyright owners more concerned about their ability to get infringing material off the Internet before their markets for a particular product are destroyed? Or are they more concerned about their ability to collect damages from infringing Internet users? If they simply want to get the material off the Internet quickly, what is the best way of getting the people with their hands on the spigot to turn it off without shutting down the pipes because of the spigot-owners liability concerns?

Answer 6. Copyright owners are concerned both about a quick removal of infringing material from Internet sites, and about their ability to avail themselves of judicial remedies, including damages, in appropriate cases of infringement. The best way to achieve quick removals is through a cooperative program of shared responsibility with online and Internet service providers, in which educational, technological, and legal tools can be brought to bear upon the problem. Infringement liability is one of those tools, because it provides powerful incentives to cooperate in preventing, detecting and pursuing network-based infringements, and facilitates the development of legal structures—including indemnification, insurance, risk management, and other techniques—that will reduce the incidence of Internet-based piracy.

CIC members believe that a rapid and efficient non-judicial "takedown" procedure, invoked by appropriate notice requirements, could play an extremely important role in limiting the damage inflicted by Internet piracy. We also agree that, if needed to encourage widespread implementation of such a procedure, liability standards and available judicial remedies should be re-examined and modified for the online environment. As part of this re-examination, a limited category of network participants—such as telecommunications carriers who do nothing more than provide the physical infrastructure, such as trunk and backbone lines, over which infringing activity takes place—could appropriately be considered for immunization from infringement liability. However, too broad an immunity would be counter-productive

and could undermine the incentives necessary to achieve the needed shared responsibility for prevention, detection and pursuit of infringements. While some of the liability concerns expressed by providers are certainly legitimate, so far there is virtually no evidence demonstrating that these concerns have hampered the growth of this dynamic new medium, or, as your question puts it, "shut down the pipes."

QUESTION FROM SENATOR THURMOND

Question. Some interested parties have expressed concern that responsibility for detecting, preventing, and remedying copyright infringement must be apportioned and balanced among all parties who participate in and benefit from the digital environment, including copyright owners, users, online service providers, and technology developers. It has also been suggested that online service providers should not be liable for simply providing access or connection to a facility, system, or network not under their direct control. Could you please provide your views on these concerns?

Answer. CIC agrees that responsibility for detecting, preventing and remedying copyright infringements in the networked environment should be shared among the parties listed in your question. We do not believe that a total immunity for providers of access or connection to an infringing site would be appropriate, because it would undermine one of the important incentives needed to encourage the development of this system of shared responsibility. We do believe that there is a place for limitations on liability or remedies for service providers in some circumstances, as part of an overall system of reasonable operating practices that includes a rapid and efficient procedure for removing or blocking access to infringing material once the provider receives appropriate notice of its presence on the network. In the context of this systematic approach, a limited category of network participants—such as telecommunications carriers who do nothing more than provide the physical infrastructure, such as trunk and backbone lines, over which infringing activity takes place, and who have no way of determining the copyright status of the material carried—could appropriately be considered for immunization from infringement liability.

QUESTIONS FROM SENATOR LEAHY

Question 1. Senator Feingold and I have sponsored the "Criminal Copyright Improvement Act," S. 1122, to close a loophole in criminal copyright law that allows flagrant, willful, but not-for-profit copyright infringers to get off scot free. This loophole was highlighted in *United States* v. *LaMacchia,* 871 F. Supp. 535 (D. Mass. 1994), where an indictment for copyright infringement could not be brought due to lack of evidence of "commercial advantage of private financial gain" against the defendant—whose operation of a computer bulletin board system for pirated software resulted in an estimated loss to the copyright holders of more than one million dollars. S. 1122 would amend 17 U.S.C. §506(a) to prohibit the willful infringement of a copyright by reproducing or distributing copyrighted material with a total retail value of the infringed-upon items is between $5,000 and $10,000, and a felony if the total retail value is more than $10,000 *De minimis* violations would not be covered. The Report of the Working Group on Intellectual Property Rights expressed general support for this bill.

Question 1A. What is your view, if any, of this legislation?

Question 1B. If the amendments proposed in S. 1284 are enacted, without addressing the loophole targeted for closing in the criminal copyright bill (S. 1122), would copyright owners remain vulnerable to flagrant, willful copyright infringements on-line?

Question 1C. In your view, is the possibility of a private civil action to remedy a copyright infringement sufficient to protect against the sort of mass piracy of copyrighted software and other works on-line that was at issue in the *LaMacchia* case?

Question 1D. Would the requisite monetary threshold, combined with the scienter requirement proposed in S. 1122 insure that merely casual or careless conduct or conduct that results in *de minimis* harm to the copyright holder would not be subject to criminal prosecution?

Answer 1A. CIC supports S. 1122 in principle. We also note that Title XIV of S. 1495 also acknowledges the need for legislative change in this area, and takes a similar, although somewhat different approach.

Answer 1B. The changes made by S. 1284 would be incomplete without also addressing the perceived criminal infringement loophole created by the *LaMacchia* decision.

Answer 1C. Civil remedies are not always sufficient to deter copyright piracy. The massive piracy of software and other copyrighted materials alleged in *LaMacchia* is a good example of the kind of conduct for which the threat of civil liability prob-

ably provides an insufficient deterrent. In cyberspace, as in more familiar environments, criminal copyright enforcement has a limited but essential role to play under U.S. law in punishing piracy and deterring potential pirates.

Answer 1D. S. 1122 provides threshold requirements that are sufficient to minimize any likelihood that criminal prosecution will be inappropriately commenced against a casual, careless, or *de minimis* infringer. The proposal, in S. 1495, to increase the scienter requirement to "malicious" in cases not involving commercial advantage or private financial gain, is also worth serious consideration as a safeguard against such abuse.

Question 2. Current copyright law already gives the owner of a work the exclusive right to distribute it, no matter the medium in which the work is published, whether on paper, videotape, cassette tape, compact disk or electronically via computer networks. Does the addition of the words "by transmission" to the illustrative list of means of distribution of copies of a work to the public in the definition of "publication" and the exclusive distribution right modify the reach of current law? If so, could you explain how?

Answer 2. The amendment to the public distribution right proposed by S. 1284 would clarify existing law. It would not create any new right or any new means of exercising an existing right. The other conforming changes would clarify that, for example, works distributed to the public only via transmission are treated as "published," with the copyright consequences that entails.

Question 3. In order to display information on a computer screen, the computer automatically copies the work into its random access memory, or RAM, which is cleared as soon as the computer is turned off. When "browsing" through computerized information on the Internet or other computer networks, the browser receives a transmission of all or part of a work in order to view it on a computer screen, prompting the work to be automatically copied into the computer's RAM.

Question 3A. Under current law, when would the RAM copying of a work constitute a copyright infringement?

Question 3B. Is the fair use doctrine sufficiently flexible to apply to the RAM copy of a work that is made when a computer user "browses" on-line?

Question 3C. Would the proposed amendment in S. 1284 alter the current legal status of "browsing"? If so, could you explain how?

Question 3D. The Digital Futures Coalition has proposed amending 17 U.S.C. 106(l) "to make clear that RAM, and other 'ephemeral', reproductions are not 'copies' within the meaning of the Copyright Act." What is your view of this proposed amendment?

Answer 3A. It is well established under current law that copying a work into RAM is an act of reproduction within the meaning of Section 106(l) of the Copyright Act. Such copying does not entail infringement liability under a number of circumstances, including the following: (i) if the copying is authorized by the copyright owner; (ii) if the copying is of a *de minimis* portion of a work; (iii) if the copying is excused by fair use under Section 107; (iv) if the copying falls within one of the other exceptions set forth in the Copyright Act or other law.

Answer 3B. Application of the fair use doctrine can be sought for any act of copying or exercise of another exclusive right, including the reproduction involved in copying a work into RAM as a user "browses" on-line. Whether the fair use claim is valid depends on the application of the factors set forth in Section 107. In addition, in many instances of browsing, the acts of reproduction have been authorized by the copyright owner, when, for example, the owner places a work on a Web site with a specific invitation to users to download copies.

Answer 3C. S. 1284 would not alter the legal status of browsing, since it neither creates nor expands any exclusive rights, nor modifies the fair use doctrine or any other relevant exception.

Answer 3D. In general, CIC opposes DFC's proposed amendment to Section 106(1), which would be a drastic change in well-established copyright law. The specific language proposed also raises a number of questions. For example, the proposal draws a distinction between "ephemeral" and "permanent" reproductions, neither of which is defined. If a reproduction of a work is so "ephemeral" as not to constitute a "copy" as defined under current law, then the amendment appears completely unnecessary. Even if not "permanent," a temporary copy may be more than ephemeral and therefore implicate the reproduction right. It is also unclear when a reproduction would or would not be "incidental" to an "otherwise lawful use" of the work; whether all kinds of "digital storage" are allowed; and how it could be determined, without highly intrusive enforcement methods, whether a particular "ephemeral reproduction" "lead[s] to the making of a permanent reproduction." CIC has other concerns about this proposal, including its impact on U.S. obligations under various

international agreements, but the foregoing is indicative of why we believe this amendment should be rejected.

Question 4. I understand that in ongoing negotiations among content providers and on-line service providers, discussion has focused on requiring copyright owners to notify on-line service providers of their claims of infringement as a condition of being able to sue. Would such a notice requirement constitute a formality imposed on the enforcement of rights, which is prohibited under the Berne Convention for the Protection of Literary and Artistic Works and to which the United States is a signatory?

Answer 4. A provision barring infringement lawsuits unless preceded by a notice to the alleged infringer would raise serious questions of compatibility with the Berne Convention prohibition on formalities. The proposals currently under serious consideration would not impose such a bar, but would limit remedies in some cases in order to encourage use of a non-judicial process invoked by notice to the service provider. The compatibility of such a scheme with Berne requirements depends on the specific limitations involved. Any such scheme would also have to comply with U.S. copyright enforcement obligations under the WTO TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement.

Question 5. Novell correctly points out that companies such as Barnes & Noble, Tower Records, Egghead Software, and Blockbuster Video cannot realistically be expected to look for copyright infringement on all the works they sell. Yet each of these businesses in subject to liability if the copies or works it sells infringe upon a copyright.

Question 5A. Does the position of on-line service providers differ in any significant way from other businesses that distribute copyright works to warrant a difference in treatment under the copyright laws? If so, could you explain how?

Question 5B. Novell has opined that if a legislative compromise cannot be achieved on the issue of on-line service provider liability for vicarious copyright infringement, "then the enactment of S. 1284 should not be delayed." Do you agree? If not, could explain why not, particularly since the business of on-line service providers has been growing, despite the potential liability faced by such providers under current copyright law?

Answer 5A. On-line service providers are in an analogous position to the other distributors of copyrighted works that your question mentions, although of course there are some important differences. One key difference is the faster pace of marketplace change in the online and Internet environment than in the more traditional retail distributions channels. this pervasive dynamism, which CIC referred to in its written testimony as a "formidable challenge" to policymakers in this area, has already brought several waves of fundamental change to the fledgling online marketplace. This rapidity of change, and the newness of online distribution, also mean that many of the mechanisms that are used in more conventional distribution channels to manage and allocate infringement liability risk, such as indemnification and insurance, are not as well developed in the online environment. Another difference is that digital technology empowers many more parties—in some cases, every customer—to place copyrighted material into the online distribution channel than is the case in conventional distribution channels.

Answer 5B. CIC agrees with Novell that enactment of the NII Copyright Act should not be delayed. At the same time, we are actively discussing with other parties the possibility of inclusion of provisions on online service provider liability in an amended version of this legislation.

Question 6. S. 1284 is not intended to diminish or weaken the doctrine of fair use in the digital environment. The Digital Futures Coalition has proposed adding the words "by transmission" to the introductory paragraph of 17 U.S.C. § 107 to make this clear. Do you agree with this proposed amendment? If not, could you explain why not?

Answer 6. The DFC's proposed amendment to Section 107 is inappropriate and unneeded. That section already provides that all the exclusive rights granted by Section 106 are subject to any applicable fair use privileges. Amending Section 107 to make a reference to transmission, which is not an exclusive right of the copyright owner, adds nothing but confusion. Enactment of S. 1284 would neither expand nor diminish the application of fair use, nor would it change any of the criteria that courts would apply in continuing to determine the applicability of his doctrine on a case-by-case basis.

Question 7. Various library associations have proposed adding to 17 U.S.C. § 108 the phrase "or if the existing format in which the work is stored has become obsolete" in order to help libraries meet the special preservation challenges posed by works in obsolete formats. What is our view of this proposed amendment?

Answer 7. The proposed expansion of section 108 to allow unauthorized copying by libraries of works in "obsolete formats" raises any questions. Who would determine whether a particular formal is obsolete? Would a library be entitled to this exception if the work was available in the marketplace in another, "Non-obsolete" format? What use could the library make of the new copy that is has made with authorization—particularly if the format has been changed from analog or print to digital? Until these and other questions are satisfactorily answered, CIC is not prepared to support this proposal.

Question 8. The Report of the Working Group on Intellectual Property Rights recognized the importance of encryption to the issue of copyright protection for on-line works, stating "encryption technology is vital because it gives copyright owners an additional degree of protection against misappropriation.

Question 8A. How significant a role do you anticipate encryption will pay in protecting intellectual property on the Internet and on other computer networks?

*Question 8B.*Current U.S. law restricts the report of strong encryption, including the Data Encryption Standard (DES) which is commonly used on the Internet and around the world. Given the global environment of the Internet and other computer networks, will these export restrictions affect how U.S. copyright holders are able to use encryption to protect their on-line works?

Question 8C. Two bills, the "Encrypted Communications Privacy Act" (S. 1587) and the "Promotion of Commerce ON-Line in the Digital Era Act" (PRO-CODE) S. 1726) are pending in the Judiciary Committee and Commerce Committee, Respectively. Each would loosen export controls on encryption technology. Would these bills, if enacted, enhance the ability of copyright owners to use encryption technology to protect their on-line works?

Answer 8A. Encryption, as well as other forms of technological protection against unauthorized exercise of exclusive rights, will play an important role in protecting intellectual property on the Internet, and thereby in encouraging the increased dissemination of copyrighted works through this dynamic new medium. This is why strong legal prohibitions on technologies aimed at circumventing such protections, as on technologies aimed at circumventing such protections, as exemplified by proposed section 1201 contained in S. 1284, are so vital.

Answer 8B. Export restrictions on encryption have a negative impact on the ability of copyright owners to use the Internet and other inherently global networks to distribute copyrighted materials that are technologically protected against unauthorized access and use.

Answer 8C. While liberalization of export controls on encryption would necessarily increase the options available to copyright owners to use technological means of protection for their intellectual property, CIC does not have specific information about the impact of enactment of S. 1587 and/or S. 1726 on its members. Nor does the Coalition as a whole have a position on the bills, although they are strongly supported by several of our member associations and companies.

The CHAIRMAN. We will turn to you, Mr. Bettis.

STATEMENT OF JOHN BETTIS

Mr. BETTIS. Thank you, Mr. Chairman. My name is John Bettis. I am a songwriter and a member of ASCAP's Board of Directors. I am attaching a brief biography which will give you a sense of my background and my work. I thank you for the mention you have made of it.

It is a very great pleasure to appear before you today on behalf of ASCAP's 70,000 writer and publisher members and express our strong support for S. 1284. I especially want to convey to you, Mr. Chairman, and to your cosponsor, Senator Leahy, our thanks for introducing this important legislation.

Mr. Chairman, as you know, all uses of music on the NII are, and should continue to be, licensable by the creator and the copyright owner. Mr. Chairman, as you also know, ASCAP licenses on my behalf and on behalf of my colleagues the right of nondramatic public performance of our music. ASCAP does so through the mechanism of a nonexclusive, reasonably priced blanket license. This license furnishes a valuable service to music users. Through it, they

are able to perform the millions of works in the ASCAP repertoire as they wish, with complete flexibility and a bare minimum of administrative concerns.

Mr. Chairman, these days it seems as if those who write songs are termed, in not so beautiful words, "content providers." Although I prefer to be called a songwriter, I will acquiesce to the term to underscore the fact that dissemination of content is the whole reason for the NII's existence. Without content, without the works that I and my fellow authors create, as the previous example has shown us so clearly, the NII is an empty shell of use to no one. Musical works are and will be widely performed on the national information infrastructure. It is vital that the copyright law adequately protect them and that users have appropriate access to them.

We believe that the key recommendation of the report of the Working Group on Intellectual Property Rights, the White Paper, is that the Copyright Act should be clarified to provide explicitly that the right of distribution protects not merely physical transfers, but also transfers by means of transmission. S. 1284 does that. We have no doubt that the current state of the Copyright Act secures that right to the creator and the copyright owner.

When a copyrighted work is downloaded into a computer, it is a reproduction and a reproduction is made by that computer. The means are irrelevant. The fact is that distribution of the reproduction has been made both as a matter of copyright law and, what is more important, as a matter of common sense.

This clarification is wise. Without it, the founders' determination to benefit our culture and our society by providing for a copyright law would be eviscerated. The Constitution empowers Congress to ensure the progress of science and the useful arts. The Copyright Act does so by encouraging creators' individual initiative, and as America's economic system has brilliantly demonstrated, the most meaningful encouragement for that individual initiative in works of intellect as well as in more tangible works is by granting economic property rights to the creator. Without that economic encouragement, creativity and the investment necessary for it would surely wither.

Mr. Chairman, I also wish to say a few words about the performing rights which my fellow songwriters and I license through ASCAP. The White Paper does not completely state the law correctly in this regard. It implies that the end user must have the capability to hear a piece of music simultaneously with its transmission for there to be a public performance under law. That is not so. Under the current copyright law which will remain unchanged, there is no requirement for simultaneity of transmission and the rendering for a public performance to have occurred.

I read from the congressional report on the Copyright Act of 1976. "A performance may be accomplished either directly or by means of any device or process, including any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented."

These uses would include computer-based information services, subscription services such as CompuServe, America Online, and Prodigy, video on demand, video services which can provide motion

pictures, and other audio-visual works from remote locations, and audio on demand or celestial jukeboxes—services which can similarly provide audio-only works. On these services and these uses, not only will renditions be incapable of being heard at the same time they are seen, they could not be any other way. That is the way the current technology works.

Current law considers virtually all of the music uses of such services to be public performances. This is absolutely critical for me and my colleagues, for without the protection of the performing right in such uses on the NII, the largest single source of our income from our music would disappear. A detailed legal explanation of the current law is included in ASCAP's statement which we have submitted for the record today.

[The statement referred to follows:]

PREPARED STATEMENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

The American Society of Composers, Authors and Publishers (ASCAP) strongly supports S. 1284, the "NII Copyright Protection Act of 1995." ASCAP commends Chairman Hatch and his co-sponsor, Sen. Leahy, for introducing this important legislation. ASCAP also commends the Working Group on Intellectual Property Rights of the Information Infrastructure Task Force, and particularly its Chair, Hon. Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, for their commitment to the protection of copyright in the digital environment, and for the development of the draft legislation upon which S. 1284 is based.

ABOUT ASCAP

ASCAP is a membership association of over 70,000 writers and publishers of copyrighted music. ASCAP licenses, on its members' behalf, the right of nondramatic public performance in their creative intellectual property. ASCAP does so through the mechanism of a nonexclusive blanket license, and so furnishes a valuable service to music users—through a single, reasonably priced ASCAP license, they are able to perform all of the many millions of works in the ASCAP repertory as they wish, with complete flexibility and a bare minimum of administrative concerns.

The whole reason for the NII's existence is to disseminate content. Without content, the NII is an empty shell of no use to anyone. And the content that fills the NII with meaning is the intellectual property of creators and copyright owners. One of the most important types of that intellectual property is music.

Because music is, and will be, widely performed in the digital environment of the National Information Infrastructure, it is vital that the copyright law adequately protect, and that users have appropriate access to, musical works. For that reason, S. 1284 is of special interest to ASCAP's writer and publisher members. Indeed, ASCAP has already issued many licenses to users for the performance of music in the digital environment. For all these reasons, ASCAP's collective licensing mechanism may offer a model for other copyright owners and users on the NII.

ASCAP SUPPORTS S. 1284

This statement will explain ASCAP's strong support for S. 1284. We will especially focus on section 2 of the legislation, which clarifies that the creator's and copyright owner's right of distribution of reproductions of a copyrighted work includes distributions by transmission. We will also comment on the state of the law as regards the performing right in music on the NII.

THE RIGHT OF DISTRIBUTION OF REPRODUCTIONS BY TRANSMISSION

We believe that the key recommendation of the Report of the Working Group on Intellectual Property Rights (the "White Paper"), and the key provision of S. 1284, is that the Copyright Act should be clarified to provide explicitly that the creator's and copyright owner's right of distribution of reproductions of copyrighted works embraces not merely physical transfers of those reproductions, but also transfers by means of transmissions resulting in the reproduction of the works. In the case of a musical work, for example, this means that the creator and copyright owner of

the musical work not only have the right to sell a printed paper-and-ink copy of the sheet music by physical transfer, but also by transmitting it electronically over a computer network and downloading it so that an electronic reproduction occurs in the ultimate user's computer (from which, for example, a physical copy may be printed out).

We have no doubt that the current state of the Copyright Act secures that right to the creator and copyright owner. When a copyrighted work is downloaded into a computer, a reproduction is made by that computer. The means by which that reproduction winds up in the possession of the end user is irrelevant to the fact that a distribution of the reproduction has been made, both as a matter of common sense and as a matter of the language of the 1976 Copyright Act, 17 U.S.C. § 106(3).

Nevertheless, to be sure that there is absolutely no basis for any claim that such a distribution may not take place by means of transmission, section 2 of S. 1284 makes an explicit addition to the language of both the distribution right, 17 U.S.C. § 106(3), and the definition of transmission, 17 U.S.C. § 101.

This clarification is wise because, if all the rights of creators and copyright owners were not safeguarded in the NII, the very purpose of the Founders in providing for a copyright law would be eviscerated. The Constitution empowers Congress to protect copyright so as to ensure the "progress of science and useful arts," that is, to benefit our culture and our society. The Founders wisely recognized that the ways to do so was by encouragement of the creator's individual initiative. And, as America's economic system has brilliantly demonstrated, the most meaningful encouragement for that individual initiative—in works of intellect as well as in more tangible works—is by granting economic property rights to the creator. Without that economic encouragement, creativity and the investment necessary for it would surely wither.

Thus, the clarification wrought by S. 1284 fits exactly within the goals of copyright as established by the Constitution, and within the American economic system which guarantees property rights and the economic benefits which can flow from them to those who create and own the property.

MUSICAL PERFORMING RIGHTS AND THE NII

The White Paper made no recommendations for legislation concerning the right of public performance on the NII. Indeed, we believe that current law inarguably protects that right on the NII. And because the White Paper so strongly and correctly concludes that protection of copyright is vital to success of the NII, we agree with and support virtually all of its statements and conclusions. We must note, however, one statement in the report which concerns the performing right and which we fear is capable of misunderstanding.

At the outset, we note that the rights of public performance (found in 17 U.S.C. § 106(4)) and of distribution of reproductions (found in 17 U.S.C. § 106(3)) are not mutually exclusive. A single transmission of a work may result in either or both of the rights being implicated, depending on the circumstances. The White Paper correctly so states (at p. 218):

"A transmission could be a transmission of a reproduction or a performance or both. The resolution of these issues should rest upon the specific facts of the case. Such issues will typically be clarified between rightshoulders and users in appropriate license arrangements."

Where the White Paper does not completely correctly state the law, and where confusion and misunderstanding might therefore occur, is in its statement that: "When a copy of a work is transmitted over wires, fiber optics, satellite signals or other modes in a digital form so that it may be captured in a user's computer, without the capability of simultaneous 'rendering' or 'showing,' it has rather clearly not been performed." (At p. 71, emphasis added.)

The fact is that, under the current Copyright Law (which will remain unchanged) there is no requirement of simultaneity of the "transmission" and the "rendering" for a public performance to have occurred. This is a vital point because there are many performances of copyrighted works—especially of copyrighted music—in which the "rendering" will not be simultaneous with the "transmission." Examples are transmissions in compressed time or real time where the end user makes a reproduction in his or her computer for later "rendition." In such cases, the "transmission" and the "rendition" are not unrelated acts. They are part of a unified process which ultimately results in the performance of the work, the Copyright Act recognizes them as performances for that reason.

These uses center about computer-based information services through which end users in their homes or offices interact with central sources (or, through central sources, with each other) to obtain and share information and entertainment. Exam-

ples would include computer-based information subscription services such as CompuServe, America OnLine and Prodigy; "video-on-demand" services which can provide motion pictures and other audiovisual works from remote locations; and "audio-on-demand" or "celestial jukebox" services which can similarly provide audio-only works from remote locations. We shall refer to all of these uses as "interactive uses" and the services which provide them as "computer-based information services."

Virtually all of the music uses of such services constitute public performances of the musical compositions used under current law. (The only obvious exception would be the performance of music in a one-to-one communication between individual home or office users—so-called electronic mail or "E-mail"—because that performance would be private, not public.) This is the way it should be, for, without the protection of the performing right in such uses on the NII, the single largest source of income for creators and copyright owners of music would be missing. Without that source of income, the wellsprings of creativity would run dry. The purpose of the copyright law, after all, is to "promote the progress of science and the useful arts," and so benefit our society, our culture, and the American public. All such uses of music on the NII should therefore be, and are, licensable by the creator and copyright owner, as follows.

1. Such uses are "Performances"

We start with the Copyright Act's grant of the exclusive right to perform copyrighted musical compositions publicly, 17 U.S.C. § 106(4). To determine whether these interactive uses fall within that provision, we must refer to the definitions of "perform" and "publicly" in the Copyright Act, 17 U.S.C. § 101.

The Copyright Act's definition of "perform" reads: "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process * * * ." The placing of a musical composition in an information system such that end users of the system are able to communicate with the system, retrieve the composition (for example, into their home computers), and then play back the composition, entails a "performance." In such cases, both the system and the end user are "rendering" the work "by means of any device or process."

Under existing law, the argument that no "performance" is taking place if the end user does not actually hear the transmission of the musical work as it occurs, but rather records the transmission (for example, by "downloading" it to a magnetic disk) for later reproduction, is wrong. That is because, under current law, the "rendering" or "playing" of the work need not be done "directly," but may be done "by means of any device or process," including different devices and a process occurring over time (we discuss this point further below). Indeed, for that reason, the transmission of a musical work in "compressed" rather than "real" time constitutes a performance, for the "compressed" time transmission is still part of a process that ultimately results in the "rendering" or "playing" of the musical work.

Similarly wrong is an argument that, because the computer-based information service is transmitting the work to the end users in digital format which the end user must convert to sounds, no "performance" is occurring. Under current law, the method by which the computer-based information service transmits the "rendering" is irrelevant. The "digitized" transmission by a computer-based information service is as much a performance as is the action of a radio broadcaster who, after all, is not transmitting "sounds," but rather is broadcasting electromagnetic waves through the atmosphere which the end user (the listener in the home) is then converting into sounds through the end user's equipment—the radio receiver.

The legislative history of the 1976 Copyright Act explicitly supports the conclusion that these transmissions entail "performances" of copyrighted works. Indeed, Congress anticipated not only electronic information retrieval systems such as these computer-based information services, but any other form of technique or system by which the same result would be achieved:

"To 'perform' a work, under the definition in section 101, includes reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime. A performance may be accomplished 'either directly or by means of any device or process,' including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented."

H. Rep. No. 94–1476, 94th Cong; 2d Sess., 63 (1967). Thus, there can be no doubt that these uses involve "performances" of music.

2. Such performances are "Public"

Of course, our inquiry must go one step farther: to be protected by copyright, there must only be a "performance," but it must be a "public" performance. Here, again, the Copyright Act's definition of "publicly" is directly on point.

A "public" performance is not merely one where all those in the audience are gathered in one place at one time, but also one in which the members of the audience are separated physically or temporally. Thus, the Copyright Act provides (17 U.S.C. § 101):

To perform * * * a work "publicly" means—(2) to transmit or otherwise communicate a performance * * * of the work * * * to the public, by means of any device or process, whether the members of the public capable of receiving the performance * * * receive it in the same place or in separate places and at the same time or at different times.

The term "transmit" is also defined by the Copyright Act as the communicating of a performance from one place to another (17 U.S.C. § 101):

"To 'transmit' a performance * * * is to communicate it by any device or process where images or sounds are received beyond the place from which they are sent."

Thus, the computer-based information services are "transmitting" the performance because they are communicating them to the end users. The specific technology used—whether by telephone wires, coaxial cables, or satellite carriers—is immaterial. And the performance is "public" because the transmission of the performance is being made to members of the public, even though they are separated physically, and even though they may perceive the performance at different times (for example, when they play back the signal which has been transmitted, but which they have "downloaded" to their home computers rather than listening to it at the time of transmission).

Again, the legislative history of the Copyright Act supports this conclusion and contradicts the erroneous notion that a "rendering" must be simultaneous with the "transmission" for a public performance to take place. In discussing the definition of "transmit," the Congressional Reports on the 1976 Copyright Act note that, no matter what the form of the transmission, if it reaches the public in any form, each and every act by which the sounds comprising a performance are conveyed and picked up is a "transmission" of a performance:

"Clause (2) of the definition of 'publicly' in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of 'transmit'—to communicate a performance or display 'by any device or process whereby images or sounds are received beyond the place from which they are sent'—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a 'transmission,' and if the transmission reaches the public in any form, the case comes within the scope of clauses (4) or (5) of section 106." H. Rep., *supra,* 64.

Thus, the fact that the performance is not perceivable when it is transmitted, and indeed that it may never be ultimately replayed by the end user who has recorded it, does not make the computer-based information service's performance any less of a public performance.

This interpretation of the Copyright Act has been supported by the court in *David* v. *Showtime/The Movie Channel, Inc.,* 1988 Copyright Law Decisions ¶26,339 (S.D.N.Y. 1988). There, the court rejected Showtime's argument that is was not "publicly performing" ASCAP music because its transmissions went not to the viewing public, but only to local cable systems for their retransmission. The court cited the statutory language and legislative history, and concluded that "Congress intended the definitions of 'public' and 'performance' to encompass each step in the process by which a protected work wends its way to its audience." Id., at p. 22,181.

The court cited other cases which supported its conclusion: *WGN Continental Broadcasting Co.* v. *United Video, Inc.,* 693 F. 2d 622, 625 (7th Cir. 1982) (holding that "the Copyright Act defines 'perform or display * * * publicly' broadly enough to encompass indirect transmission to the ultimate public"); *Hubbard Broadcasting, Inc.* v. *Southern Satellite Systems, Inc.,* 593 F. Supp. 808, 813 (D. Minn. 1984) (stating that "under the broad definitions found in § 101 of the Copyright Act, a transmission is a public performance whether made directly or indirectly to the public and whether the transmitter originates, concludes or simply carries the signal"), aff'd, 777 F. 2d 393 (8th Cir. 1985), cert. denied, 479 U.S. 1005 (1986).

A more recent case involving a computer-based information service and the right of public display (which has always been seen as directly analogous to the right of public performance) supports this conclusion that such transmissions are public performances. In *Playboy Enterprises, Inc.* v. *Frena,* 839 F. Supp. 1552 (M.D. Fla 1993), 1994 copyright Law Decisions ¶27,288, a copyrighted photographic image was placed on a computer-based information service "bulletin board" for downloading by subscribers, all without the authorization of the copyright owner. The court held that such transmission infringed the display right: "The display right precludes unauthorized transmission of the display from one place to another, for example, by a computer system." (Id. at p. 27,236) the same is true of the performing right.

In sum then, existing law fully protects the performing right even when the "rendering" is not simultaneous with the "transmission." Despite the law's clarity, it is possible that some may wish to use the White Paper's implication to argue that an ambiguity exists. To answer that erroneous argument, the Subcommittee may think it wise to reaffirm existing law.

COPYRIGHT PROTECTION SYSTEMS AND COPYRIGHT MANAGEMENT INFORMATION

We believe that the NII holds the promise of new forms of security for copyright works, and new means of conveying information about copyrighted works which will benefit both creator and copyright owners, and users. As S. 1284 recognizes however, it is essential that the integrity of such systems for copyright protection and copyright management information be protected, as provided for by section 4 of the legislation. While we recognize that there may need to be fine-tuning of this provision, we fully support the principle behind it.

EXEMPTION FOR LIBRARIES AND THE VISUALLY IMPAIRED

Section 3 of S. 1284 provides certain exemptions for libraries and the visually impaired. Again, while some fine-tuning may be necessary to ensure against abuse of these exemptions, we have no argument with the principle behind them.

CONCLUSION

In sum, ASCAP strongly supports S. 1284 as a basis for ensuring the protection of copyright on the NII. We stand ready to offer the Committee any assistance we can towards achieving its enactment into law.

Mr. BETTIS. In conclusion, Mr. Chairman, my fellow writers and publishers at ASCAP strongly support S. 1284 as a basis for ensuring the protection of copyright on the NII. We stand ready to offer the committee any assistance we can toward achieving its enactment into law.

I thank you for your time.

The CHAIRMAN. Thank you, Mr. Bettis.

[The prepared statement of Mr. Bettis follows:]

PREPARED STATEMENT OF JOHN BETTIS

Mr. Chairman, my name is John Bettis. I am a songwriter, and a member of ASCAP's Board of Directors. I am attaching a brief biography which will give you a sense of my background and my work. It is a very great pleasure to appear before you today on behalf of ASCAP's 70,000 writer and publisher members and express our strong support for S. 1284. I especially want to convey to you, Mr. Chairman, and to your co-sponsor, Senator Leahy, our thanks for introducing this important legislation.

Mr. Chairman, as you know, ASCAP licenses, on my behalf and that of my colleagues, the right of nondramatic public performance in our music. ASCAP does so through the mechanism of a nonexclusive, reasonably-priced blanket license, and so furnishes a valuable service to music users. Through it, they are able to perform the millions of works in the ASCAP repertory as they wish, with complete flexibility and a bare minimum of administrative concerns.

Mr. Chairman, these days it seems that those who create are now termed, in non-so-beautiful words, "content providers." Although I prefer songwriter, I shall use that term to underscore that dissemination of content is the whole reason for the NII's existence. Without content—without the works that I and my fellow authors create—the NII is an empty shell of no use to anyone. One of the most important types of that content is music.

Because musical works are, and will be, widely performed on the National Information Infrastructure, it is vital that the copyright law adequately protect them, and that users have appropriate access to them.

We believe that the key recommendation of the Report of the Working Group on Intellectual Property Rights (the "White Paper"), is that the Copyright Act should be clarified to provide explicitly that the right of distribution of reproductions of copyrighted works protects not merely physical transfers, but also transfers by means of transmissions resulting in the reproduction of the works. S. 1284 does that. In the case of a musical work, for example, this means that the right of a creator and copyright owner of a musical work is not limited to sale of a physical copy of the sheet music by physical transfer. That right also covers transmission and downloading over a computer network in which an electronic reproduction occurs in the ultimate user's computer from which, for example, a physical copy may be printed out.

We have no doubt that the current state of the Copyright Act secures that right to the creator and copyright owner. When a copyrighted work is downloaded into a computer, a reproduction is made by the computer. The means by which that reproduction winds up in the possession of the end user is irrelevant. The fact is, a distribution of the reproduction has been made, both as a matter of Copyright Law, and what is more important, as a matter of common sense.

Nevertheless, to be sure that there is absolutely no legal doubt that such a distribution may not be made by means of transmission, section 2 of S. 1284 makes an explicit addition to the language of both the distribution right and the definition of transmission.

This clarification is wise. Without it, the Founders' determination to benefit our culture and our society by providing for a copyright law in our Constitution would be eviscerated. The Constitution empowers Congress to ensure the "progress of science and useful arts". The Copyright Act does so by encouraging a creator's individual initiative. And, as America's economic system has brilliantly demonstrated, the most meaningful encouragement for that individual initiative—in works of intellect as well as in more tangible works—is by granting economic property rights to the Creator. Without that economic encouragement, creativity and the investment necessary for it would surely wither.

Thus, the clarification wrought by S. 1284 fits exactly within the Constitution's copyright goals and within the American economic system's guarantee of property rights and the economic benefits which flow from them.

Mr. Chairman, I also wish to say a few words about the performing rights which my fellow songwriters and I license through ASCAP, because the White Paper does not completely correctly state the law in this regard. It implies that the end user must be able to hear a musical work simultaneous with its transmission for there to be a public performance under the law. That is not so.

Under the current Copyright Law (which will remain unchanged) there is no requirement of simultaneity of the "transmission" and the "rendering" for a public performance to have occurred. This is a vital point because there are many performances of copyrighted works—especially of copyrighted music—in which the "rendering" will not be simultaneous with the "transmission." An example would be transmissions in compressed time or real time where the end user makes a reproduction in his or her computer for later "rendition." In such cases, the "transmission" and the "rendition" are not unrelated acts. They are part of a process without which a performance could not occur, and the Copyright Act recognizes them as performances for that reason.

These uses involve computer-based information services with which end users interact to obtain and share information and entertainment. Examples would include computer-based information susbscription services such as CompuServe, America OnLine and Prodigy; "video-on-demand" services which can provide motion pictures and other audiovisual works from remote locations; and "audio-on-demand" or "celestial jukebox" services which can similarly provide audio-only works from remote locations.

Current law considers virtually all of the music uses of such services to be public performances. This is absolutely critical for me and my colleagues, for, without the protection of the performing right in such uses on the NII, the single largest source of our income from our music would disappear. Without that source of income, we could not earn a living. In order words, the wellsprings of our creativity would run dry and the purpose of the copyright law, to "promote the progress of science and the useful arts," would be thwarted. All such uses of music on the NII therefore are, and should continue to be, licensable by the creator and copyright owner.

A detailed legal explanation of the current law is included in ASCAP's statement which we have submitted for the record today.

In conclusion Mr. Chairman, my fellow writers and publishers at ASCAP strongly support S. 1284 as a basis for ensuring the protection of copyright on the NII. We stand ready to offer the Committee any assistance we can towards achieving its enactment into law.

JOHN BETTIS: LYRICIST

John Bettis, lyricist, has written songs that have sold more than 180 million records. They have been sung by some of the greatest artists of our time. Michael Jackson, Madonna, Diana Ross, Whitney Houston, Karen Carpenter and scores of others have recorded his work.

In 1995, John was proud to have been elected to the Board of Directors of ASCAP. In March of 1995 Julio Iglesias and Dolly Parton released a duet of John's song When You Tell Me That You Love Me.

He is currently at work on songs for Faith Hill, Ray Vega and other country artists. He is writing new projects with longtime collaborator Richard Carpenter and new collaborator Kostas. Diana Ross has recorded a new song Voice of The Heart, which is her new single in England and America. With Walter Afanasieff, John is writing songs for several of Walter's productions. He is also actively developing two new musicals.

In 1994, Once in Awhile was featured in the film "8 Seconds". It was performed in the film, released as a single by Billy Dean and went gold on both the soundtrack album and Billy Dean's greatest hits. In theater, John's new musical Lunch enjoyed a successful national tour of 7 cities over 12 weeks.

In 1993, John's song Heartland, sung by George Strait, achieved triple platinum on the soundtrack album from the film "Pure Country" and the single reached #1 on the country charts for two straight weeks. John's song Human Nature was the basis for Right Here (Human Nature) by SWV which went to #2 on the Pop charts and was #1 on the R&B charts for seven weeks. Songs co-written by John, James Ingram and Burt Bacharach also gained success in the same year. Michael Crawford released a Bettis collaboration with Walter Afanasieff which has gone #1 in Australia and gold in America.

In 1992, his song Heartland opened the film "Pure Country" starring George Strait. If You Could See Me Now was included in Celine Dion's platinum album. In addition, the song If You Go Away, sung by New Kids On The Block, was #1 in England and Top Twenty in the USA. When You Tell Me That You Love Me, recorded by Diana Ross, also achieved #1 status in England. In the same year John's new musical Lunch premiered at the Cherry County Playhouse.

In 1991, John's song Can You Stop The Rain, a #1 record by Peabo Bryson, was nominated for a Grammy as Best R&B song. Also in 1991, three films featured his songs. You Never Know was sung by Ringo Starr in the John Hughes film "Curly Sue." Under The Christmas Tree was featured in the Paramount film "All I Want For Christmas." Friday Night opened the Warner Bros. film "The Last Boy Scout." He was also recognized by The American Society of Composers, Authors and Publishers (ASCAP) for the most performed themes on television in 1991.

John has received 30 awards for performance of his work on radio and television. He has been nominated for 3 Emmies for his work in television. He received an Emmy and was nominated for a Grammy for One Moment in Time as Best Song Written for Film or Television. He was nominated for an Oscar and a Golden Globe for Promise Me You'll Remember from "The Godfather Part III," sung by Harry Connick Jr. The Nashville Songwriter's Association cited John for excellence as a nominee for Song Of The Year. He was designated Honorary Citizen of Tennessee for his contributions to country music by Gov. Lamar Alexander. The date, July 18, 1985 was declared John Bettis Day in Los Angeles, John's native city, in honor of his "continuing excellence in the field of song writing."

In 1967, John was a founding member of The Carpenters. He and Richard Carpenter wrote 38 songs recorded by them, including the pop standards: Top of The World, Yesterday once More, Good-Bye to Love and Only Yesterday. Moving to Nashville, he continued his success with a string of #1 country songs: Only One Love in My Life (Ronnie Milsap), Slow Hand (Conway Twitty) and One of A Kind Pair of Fools (Barbara Mandrell).

In the 80's, John expanded his record credits to include the classics Slow Hand (Pointer Sisters), Human Nature (Michael Jackson—on the Thriller album which at 40 million copies is the largest selling album in history), Crazy For You (Madonna), One Moment in Time (Whitney Houston and an Emmy Award Winner as Theme for the 1988 Olympics). He also enjoyed hits by Donna Summer, Juice Newton,

Barry Manilow, Christopher Cross, Steve Perry, Jennifer Warnes, Bill Medley, and .38 Special.

John has provided songs for 20 films. They include, in addition to the above, "Say Anything," "Star Trek V," "Cocktail," "Nothing In Common," and others. The Eyes of The World was co-written with Steve Dorff and sung by Michael Crawford to celebrate the fiftieth anniversary of Warner Bros. Films.

John has now dedicated himself to his lifetime dream, musical theater. Svengali opened April 3, 1991 at the Houston Alley Theater. The work was awarded the prestigious D. Alton Jones grant. Lunch, the first musical from the Dorff, Hawkins and Bettis team, after a successful run at The Cherry County Playhouse in the summer of 1992, was staged by the National Alliance of Musical Theater Producers in New York to rave response and toured nationally in 1994. Two more musicals are in development.

ASCAP,
ONE LINCOLN PLAZA,
New York, NY, May 24, 1996.

Senator ORRIN G. HATCH,
U.S. Senate,
Committee on the Judiciary, Washington, DC.

Re: S. 1284.

DEAR SENATOR HATCH: I write in response to your letter of May 14, 1996, which forwarded supplemental written questions to those posed to me when I testified at your Committee's hearing on S. 1284 on May 7, 1996. At the outset, I wish to thank you and the other Committee members for the opportunity to appear before you on this most important legislation. As I said in my testimony, I wish especially to commend you and your co-sponsors for introducing this bill, which has ASCAP's complete support. I also wish to thank you personally for the warm and courteous welcome you gave me in appearing before you. I will answer your questions and those of your colleagues, to the best of my ability (remembering that I am a songwriter and not a lawyer), in the order they were posed.

QUESTIONS FROM SENATOR HATCH

Question 1. Some have suggested that an effective way of insulating online service providers from liability for infringements on their networks would be the purchase of blanket licenses. I understand that some online service providers have already done so. Is this an effective means of providing protection for both online service providers and copyright owners? Can you estimate for the Committee the cost of such licenses and indicate what effect they might have on the average cost of a subscription to an Internet service?

Answer 1. I believe that the purchase of blanket licenses is not only an effective way, but the best way, of providing protection for both online service providers and creators and copyright owners in the digital environment. An online service provider which purchases an ASCAP blanket license is thereby completely immunized from any question of copyright liability as to the nondramatic public performance of copyrighted musical compositions in the ASCAP repertory. And songwriters and music publishers are thereby paid for these uses of their works, and so can continue to earn their living from their craft and business.

As to the cost of an ASCAP license, the simplest way of answering is to provide the form of ASCAP blanket license offered to online service providers, and a copy is attached. As you will note, the license has four possible rate schedules, elected at the option of the licensee. These different rate schedules were provided because different online services make different uses of music, and the license should be and is tailored to those different types of uses so that the fee for each is reasonable. I could only hazard a guess as to the effect on the average cost of a subscription to an Internet service, but my guess would be fractions of a cent (or at most a few cents) per subscriber per year.

Question 2. Bookstore patrons are free to browse through books on the shelves in order to decide which, if any, they wish to buy. Under S. 1284, will Internet patrons be able to browse in cyberspace in the same way they can in a bookstore?

Answer 2. The difference between browsing in a bookstore and browsing in cyberspace is this, and it is a crucial difference: In the bookstore, the patron cannot copy the book, and must buy it if she is to have a copy. In cyberspace, the browsing user can, with the touch of a button, make a complete, perfect copy of the work, thus obviating the need to buy it. If there are technological means to prevent such use, then copyright owners might avail themselves of those means and use "brows-

ing" to market their works. But, because of the crucial difference between traditional media and cyberspace, the choice must be the copyright owner's.

Question 3. As you know, the first sale doctrine allows a book owner to give his/her book to someone else without infringing on the public distribution right. After this transaction, there is no copy in the hands of the transferor. If this is done on the Internet, however, there is an electronic copy in the computer of the transferor and an electronic reproduction is made in the transferee's computer. Both the Register of Copyrights and the Commissioner of Patents and Trademarks opined at our last hearing that this phenomenon would preclude the first sale doctrine from operating in cyberspace. Is there any way that we can preserve the first sale doctrine in cyberspace?

Answer 3. I see no way of preserving the first sale doctrine in cyberspace unless there is an absolutely certain means of destroying the copy that resides on the "seller's" computer when the copy is transferred. Simply put, the first sale doctrine was created to apply to tangible physical copies, not to digital electronic copies. It should not be forced to fit a situation for which it was not created.

Question 4. I know the Digital Future Coalition has proposed a cyberspace first sale rule which allows a possessor to pass a copy to someone else if she deletes her copy at "substantially the same time." Is it possible for such a rule to be enforced without significant incursions on privacy? How does one determine the outer bounds of the "substantially the same time" requirement?

Answer 4. I see no way of enforcing such a rule, and no way of determining the outer bounds of such a time frame. The proposed rule is, it seems to me, nothing more than a subterfuge to condone piracy.

Question 5. In the recent *Netcom* decision, the court stated that imposing direct infringement liability on an Internet access provider who simply sets up "a system that automatically and uniformly creates temporary copies of all data sent through it" and automatically retransmits those copies to other servers would be unworkable since it "would hold the entire Internet liable for activities that cannot reasonably be deterred." Would you comment on whether this is an appropriate assessment of the impact of strict liability for direct infringement on the Internet access providers? Could you suggest what standard of liability should apply to online service providers for infringements upon their users? Should there be different standards for those who are simply "open pipes" as opposed to those who provide additional services?

Answer 5. I understand that copyright owners and online service providers have been meeting under the aegis of the House Intellectual Property Subcommittee to attempt to devise a workable definition of such "open pipe" (or, as they have also been termed, "mere conduit") services. I am also told that the copyright owners' proposal for that definition has been furnished to the Committee, and would suggest that it forms the basis for a definition of the circumstances in which such services should not incur liability for copyright infringement.

Question 6. Are copyright owners more concerned about their ability to get infringing material off the Internet before their markets for a particular product are destroyed? Or are they more concerned about their ability to collect damages from infringing Internet users? If they simply want to get the material off the Internet quickly, what is the best way of getting the people with their hands on the spigot to turn it off without shutting down the pipes because of the spigot-owners' liability concerns?

Answer 6. I think there are two important answers to this issue. To take the last matter first, a good way of "shutting off the spigot" is that suggested by the copyright owners in the proposal referenced above. But I think that it is not correct that copyright owners as a group are more or less interested in one particular type of remedy for unauthorized use in cyberspace. In some cases—for example, in the case of unauthorized duplication of copies or phonorecords—the copyright owner may be most concerned with getting infringing material off the Internet to save the market. In other cases—for example, the transmission of copies of a valuable piece of computer software—the damage might have been done as soon as the transmission occurred, and in ruinous financial terms; in those cases, the ability to collect damages may be most important. And for some uses—such as the public performance of copyrighted music—both matters are of concern. There is no one type of damage caused by piracy and no one remedy for it. That is why the copyright law contains both injunctive and monetary relief for the copyright owner in the case of infringement, and why that panoply of remedies must continue to apply in cyberspace.

QUESTION FROM SENATOR THURMOND

Question 1. Some interested parties have expressed concern that responsibility for detecting, preventing, and remedying copyright infringement must be apportioned

and balanced among all parties who participate in and benefit from the digital environment, including copyright owners, users, online service providers, and technology developers. It has also been suggested that online service providers should not be liable for simply providing access or connection to a facility, system, or network not under their direct control. Could you please provide your views on these concerns?

Answer 1. Copyright owners already bear a heavy burden for enforcement of their copyrights. If someone steals my car, I can call the police and they will assist me—indeed, they will do virtually all the work—in recovering it and catching the criminals. But there is no police force to assist creators and copyright owners when their intellectual property is stolen. Our law places the burden on the copyright owner to police theft of his works. That is why the law has developed the theories of liability for direct, contributory and vicarious infringement which exist. The tests for those types of liability are fair and well-developed. And the fact is that online services are benefitting financially from the content they are carrying. If they are liable under current law, they should not be allowed to evade that liability. Therefore, the notion that there must be some further "balancing" of responsibilities for preventing this type of theft is simply doubletalk, and should be recognized as an attempt to evade proper responsibility for infringing acts.

QUESTIONS FROM SENATOR LEAHY

Question 1. Senator Feingold and I have sponsored the "Criminal Copyright Improvement Act," S. 1122, to close a loophole in criminal copyright law that allows flagrant, willful, but not-for-profit copyright infringers to get off scot free. This loophole was highlighted in *United States* v. *LaMacchia,* 871 F. Supp. 535 (D. Mass. 1994), where an indictment for copyright infringement could not be brought due to lack of evidence of "commercial advantage or private financial gain" against the defendant—whose operation of a computer bulletin board system for pirated software resulted in an estimated loss to the copyright holders of more than one million dollars. S. 1122 would amend 17 U.S.C. §506(a) to prohibit the willful infringement of a copyright by reproducing or distributing copyrighted material with a total retain value of $5,000 or more. The criminal offense would be a misdemeanor if the total retail value of the infringed-upon items is between $5,000 and $10,000, and a felony if the total retail value is more than $10,000. *De minimis* violations would not be covered. The Report of the Working Group on Intellectual Property Rights expressed general support for this bill.

Question 1A. What is your view, if any, of this legislation?

Answer 1A. This is very wise legislation, and we support it completely.

Question 1B. If the amendments proposed in S. 1284 are enacted, without addressing the loophole targeted for closing in the criminal copyright bill (S. 1122), would copyright owners remain vulnerable to flagrant, willful copyright infringements on-line?

Answer 1B. Yes. That is why your proposed legislation is so wise.

Question 1C. In your view, is the possibility of a private civil action to remedy a copyright infringement sufficient to protect against the sort of mass privacy of copyrighted software and other works on-line that was at issue in the *LaMacchia* case?

Answer 1C. No. As I noted above, copyright owners have no police force to help them as a general matter. The Government rarely brings criminal copyright infringement cases, and then only in what appear to be particularly egregious circumstances. Therefore, any help copyright owners and the authorities can get in seeing to it that criminal infringements are prevented is highly desirable.

Question 1D. Would the requisite monetary threshold, combined with the scienter requirement, proposed in S. 1122 insure that merely casual or careless conduct or conduct that result in *de minimis* harm to the copyright holder would not be subject to criminal prosecution?

Answer 1D. Yes.

Question 2. Current copyright law already gives the owner of a work the exclusive right to distribute it, no matter the medium in which the work is published, whether on paper, videotape, cassette tape, compact disk or electronically via computer networks. Does the addition of the words "by transmission" to the illustrative list of means of distribution of copies of a work to the public in the definition of "publication" and the exclusive distribution right modify the reach of current law? If so, could you explain how?

Answer 2. No. As I noted in my testimony to the Committee, the proposed language is not a change in the law, but merely a clarification of it.

Question 3. In order to display information on a computer screen, the computer automatically copies the work into its random access memory, or RAM, which is

cleared as soon as the computer is turned off. When "browsing" through computerized information on the Internet or other computer networks, the browser receives a transmission of all or part of a work in order to view it on a computer screen, prompting the work to be automatically copies into the computer's RAM.

Question 3A. Under current law, when would the RAM copying of a work constitute a copyright infringement?

Answer 3A. As this question concerns a right which ASCAP does not license, and as it requires a detailed legal analysis of current law, I think it best to leave the answer to those who have a more direct interest in the issue, such as the Creative Incentive Coalition.

Question 3B. Is the fair use doctrine sufficiently flexible to apply to the RAM copy of a work that is made when a computer user "browses" on-line?

Answer 3B. Yes. The fair use doctrine was designed to be flexible, and has worked very well to cover many different circumstances. It would adequately cover that presented as well.

Question 3C. Would the proposed amendments in S. 1284 alter the current legal status of "browsing"? If so, could you explain how?

Answer 3C. Not that I can see.

Question 3D. The Digital Futures Coalition has proposed amending 17 U.S.C. § 106(1) "to make clear that RAM, and other 'ephemeral', reproductions are not 'copies' within the meaning of the Copyright Act." What is your view of this proposed amendment?

Answer 3D. This proposed amendment would be unwise. I do not think that the existing rights of a copyright owner should be cut back in any way. As previously noted, fair use doctrine is more than up to the task.

Question 4. I understand that in ongoing negotiations among content providers and on-line service providers, discussion has focused on requiring copyright owners to notify on-line service providers of their claims of infringement as a condition of being able to sue. Would such a notice requirement constitute a formality imposed on the enforcement of rights, which is prohibited under the Berne Convention for the Protection of Literary and Artistic Works and to which the United States is a signatory?

Answer 4. Yes.

Question 5. Novell correctly points out that companies such as Barnes & Noble, Tower Records, Egghead Software, and Blockbuster Video cannot realistically be expected to look for copyright infringement on all the works they sell. Yet each of these businesses is subject to liability of the copies or works it sells infringement upon a copyright.

Question 5A. Does the position of on-line service providers differ in nay significant way from other businesses that distribute copyrighted works to warrant a difference in treatment under the copyright laws? If so, could you explain how?

Answer 5A. No.

Question 5B. Novell has opined that if a legislative compromise cannot be achieved on the issue of on-line service provider liability for vicarious copyright infringement, "then the enactment of S. 1284 should not be delayed." Do you agree? If no, could you explain why not, particularly since the business of on-line service providers has been growing, despite the potential liability faced by such providers under current copyright law?

Answer 5B. Yes.

Question 6. S. 1284 is not intended to diminish or weaken the doctrine of fair use in the digital environment. The Digital Futures Coalition has proposed adding the words "by transmission" to the introductory paragraph of 17 U.S.C. § 107 to make this clear. Do you agree with this proposed amendment? If not, could you explain why not?

Answer 6. No. There is no need to add any text to the fair use provision of the Copyright Act, for it is so broadly stated that, by its own terms, it refers to every possible use of copyright works. Further, S. 1284 does not add a new right of "transmission" to the Copyright Act—it merely clarifies that the right of distribution may be exercised by electronic transmission, as well as by physical delivery, of a copy. There is no need to tamper with the basic provisions of the copyright law such as the Digital Futures Coalition proposes.

Question 7. Various library associations have proposed adding to 17 U.S.C. § 108 the phrase "or if the existing format in which the work is stored has become obsolete" in order to help libraries meet the special preservation challenges posed by works in obsolete formats. What is your view of this proposed amendment?

Answer 7. Copyright owners want to assist libraries in their legitimate preservation efforts as much as the libraries want to undertake them. Therefore, the proper

way of determining whether any such amendment is necessary is to allow the interested parties to discuss it first among themselves.

Question 8. The Report of the Working Group on Intellectual Property Rights recognized the importance of encryption to the issue of copyright protection for on-line works, stating "encryption technology is vital because it gives copyright owners an additional degree of protection against misappropriation."

Question 8A. How significant a role do you anticipate encryption will play in protecting intellectual property on the Internet and on other computer networks?

Answer 8A. Encryption holds the promise of solving many (although not all) of the knotty issues which plague us concerning the use of copyrighted materials in cyberspace. Of course, as with many aspects of the digital environment, the reality of encryption at this time falls far short of the predicted potential it has. I therefore suggest that encryption not be regarded as a panacea, but rather that it be cautiously factored into the equation of solving these issues.

Question 8B. Current U.S. law restricts the export of strong encryption, including the Data Encryption Standard (DES) which is commonly used on the Internet and around the world. Given the global environment of the Internet and other computer networks, will these export restrictions affect how U.S. copyright holders are able to use encryption to protect their on-line works?

Question 8C. Two bills, the "Encrypted Communications Privacy Act" (S. 1587) and the "Promotion of Commerce On-Line in the Digital Era Act" (PRO-CODE) (S. 1726) are pending in the Judiciary Committee and Commerce Committee, respectively. Each would loosen export controls on encryption technology. Would these bills, if enacted, enhance the ability of copyright owners to use encryption technology to protect their on-line works?

Answers 8B and 8C. I simply do not have the expertise necessary to answer these questions, and again would defer to those more knowledgeable than I on this subject.

Once again, I wish to express my thanks to you for the kind reception you and your Committee gave me, and for the opportunity to appear before you. I want you to know that I and my fellow songwriters and members of ASCAP greatly appreciate your support for strong copyright protection, and for American creativity and creators.

Sincerely,

JOHN BETTIS.

The CHAIRMAN. Mr. Burrington, we will take your statement at this time.

STATEMENT OF WILLIAM W. BURRINGTON

Mr. BURRINGTON. Good morning, Mr. Chairman. I want to thank you and Senator Leahy for your leadership on this issue and for having me here on behalf of a coalition. I am Bill Burrington, assistant general counsel and director of public policy for America Online, based in Vienna, VA. We have a large office. We have actually opened a facility in Utah, in Provo, as well, just for your information.

The CHAIRMAN. I am impressed with that. I think all these other industries should consider that as well. [Laughter.]

Mr. BURRINGTON. It was a great choice.

I am here on behalf of an unprecedented coalition of companies because of an issue of great importance not only to our industries, but to all of us here in this room, obviously. In the last 2 years, a new global vision of the future has arisen that startles even those of us jaded to rapid technological change. The vision is of an instantaneous access to and sharing of information, of thought, and of culture. Central to it are computer networks, chief among them the Internet.

At little cost, through the Internet, Americans in rural or depressed areas can have virtually the same access to research data, to news, art, entertainment, and lively discourse as that enjoyed by residents of our largest cities. The Internet, including its World

Wide Web, is the next great leveler in our evolution to a fairer and more open society.

However, Congress is now considering legislation which has the potential to cripple this great new communications medium of the 21st century. As currently drafted, the NII Copyright Act would impose direct, vicarious and contributory infringement liability on providers of the infrastructure, Internet access and online services if their customers infringe copyrights. This is both unfair and unworkable, except in carefully defined circumstances.

To understand why, we have to understand how these computer networks operate and the implications for copyright law. That is the purpose of the video I am about to show, and at the conclusion we hope that you will agree with us that the best approach is a balanced one in which service providers should bear the burden of others' wrongful acts only when they have actual knowledge of the infringement and an effective ability to control it and they take no prompt action to do so.

Now, we will show our video.

[Videotape shown.]

Mr. BURRINGTON. Thank you, Mr. Chairman. I don't want to burn out your red light up there, so I will conclude quickly. I think that you can get the gist of the issue and our concerns from that video.

The CHAIRMAN. We sure can.

Mr. BURRINGTON. We are in full agreement with the Creative Incentive Coalition and others that, of course, as there is in any other aspect of the world, regardless of the medium, there is infringement and piracy in cyber space. I don't think that is really the issue that is before this committee. The issue is really how do we best address it, how do we do it in a meaningful way that is going to be effective in light of the various interests involved here and in light of the unique attributes of this medium.

I think to that end, we have been working closely with the copyright community to try to come to that solution, and it is going to be a combination of this committee and Congress coming up with some public policies that make sense in light of the medium, as well as working together to develop technology solutions and educating users on the importance of copyright in cyber space.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you so much. All of you are going to have to help us to figure out what is the totally appropriate way to resolve this. I am not wedded to any language. We can see that this is extremely important and extremely critical.

[The prepared statement of Mr. Burrington follows:]

PREPARED STATEMENT OF WILLIAM W. BURRINGTON

Good morning. I am Bill Burrington, Assistant General Counsel and Director of Public Policy with America Online. America Online is a member of the Ad Hoc Copyright Coalition, a large group of companies and organizations sharing similar concerns about the copyright and technical issues we are discussing today. It is my belief that this testimony expresses the essential positions of the coalition.

I would like to thank the Committee for its attention to the application of copyright law in the digital information environment. The Chairman and other members of the Committee have made clear that S. 1284 is a starting point for this inquiry, and we encourage your careful review of this and related legislative proposals.

The digital environment—including the National Information Infrastructure, or NII—is complex, but not impenetrable. The issues we are discussing are likewise complex, but there are clear guideposts we will suggest that can appropriately guide the Committee as it moves forward. The stakes are high, not only for service and infrastructure providers and for copyright owners, but for the rest of us—the tens of millions who use the Internet and similar networks, and the millions who will do so in the near future. And above all, we urge the Committee, in any legislative solution it may adopt, to pursue a realistic approach that determines copyright liability in a meaningful way without adding undue and inappropriate costs to the NII.

The coalition which I represent today is composed of America's leading on-line, Internet access, Internet software development, and infrastructure companies, including a unique combination of the long-distance and regional telephone operating companies, as well as hundreds of companies that would be subject to this legislation simply because they have inhouse corporate E-mail systems. In a real way, we are the heart and soul of the National Information Infrastructure. As such, we are uniquely qualified to advise you of the impact your actions may have on the Internet and similar networks.

The Internet—a global network of interconnected networks—offers unlimited and unimagined potential in areas such as education, medicine, and commerce. Unknown to all but a few computer wizards until only recently, the Internet promises to be an information tool with the capacity to drive economic development worldwide. No longer content with just bringing basic telephone services to rural or economically deprived areas, the Congress must ensure this incredible source of information remains a rich resource for its citizens in rural as well as urban areas. Otherwise, the chasm between information "haves" and "have nots" will widen, creating distinct classes of economic haves and have nots.

Our coalition believes a copyright bill is needed. But, if we do the wrong thing, it will be worse than doing nothing at all. As currently drafted, S. 1284, while a good faith attempt to address these needs, is not the appropriate solution, and we could not support it in this form. Let's examine the situation: Continuing development of the Internet depends upon its ability to operate in an environment that recognizes both the benefits and risks the Internet can bring. The ability to disseminate information worldwide has a downside that must be recognized: Today's Internet does not distinguish between copyrighted and non-copyrighted information. And copyright owners are harmed regardless of whether their rights are infringed by an individual standing in front of a photocopying machine or sitting before a computer terminal. Legislation is needed to ensure that all the parties involved in the Internet—Internet service providers, system operators, copyright owners, and Internet users alike—are aware of their rights and risks and are reasonably protected from financial harm.

In its current form, the National Information Infrastructure Copyright Act, S. 1284, will not succeed in creating an environment where businesses continue to invest in providing Internet services, copyright owners confidently view the Internet as a vehicle for distributing their works, and users have access to all types of information they want and need. The problem is that some interpretations of the current copyright law—and the changes proposed in S. 1284—are at odds with the underlying architecture of the Internet, which functions by copying and transmitting files. Because the ability to "copy" a protected work is an exclusive right of the copyright holder, a provider of Internet access or services is implicated each time its equipment or service is used to copy a protected work in response to a command from a customer, even if that copy is a transitory artifact of transmission lasting a fraction of a second. Further, "clarifying" the exclusive right of distribution to include "transmission" exacerbates the problem. Transmission is a term of art in the on-line environment, and the clarification serves only to ensure that Internet access and service providers are inevitably implicated in on-line copyright infringements over which they have no real control. Because this risk is unacceptable, Internet and on-line service and system providers seek legislation that clarifies that their role is not to serve as a deep pocket that will make content providers whole when their rights are infringed by third party Internet users.

Thus, legislation is necessary to define the responsibilities and liabilities of all participants in the on-line environment. In its current form, S. 1284 assigns broad responsibilities to Internet and on-line service providers that copyright owners themselves should more appropriately assume, and it assigns liability to Internet and on-line service providers that more appropriately rests with the users who initiate the infringing actions. A better solution would balance benefits with responsibility, and liability with blame. Only then would the environment be adequately defined so that Internet and access service providers—with a reasonable degree of cer-

tainty as to the potential risks and liabilities they would face—could continue to offer the network components and services that comprise the Internet.

Some parties would argue that the nature of the Internet is too dynamic to allow us to legislate today the environment of the future. New players will enter the field, companies will innovate, and the Internet as we know it will continue to evolve. They would further submit that legislative delay is appropriate because there are technological solutions in the offing that may provide necessary protection for content owners. Or, they would suggest that we should strive to resolve the easy issues today, and continue to negotiate the more contentious ones. Such a delayed or piecemeal approach is neither practical nor desirable. Comprehensive and balanced legislation is needed today.

First, there never will be legislation if we wait for the world of the Internet to achieve equilibrium. Even if the players and roles change, the basic functions of the Internet will remain the same. Already today, a party that provides conduit services may also offer or package content on the World Wide Web. In each case, its responsibility and liability is based on the function it performs. Second, the technological solutions to copyright infringement do not yet exist, and there is no guarantee they ever will. Until they are developed, it is necessary to legislate for the current operating environment—or uncertainty could drive away the critical players necessary to ensure the Internet's continuing development. Finally, only a comprehensive approach will suffice. The legal and technical issues involved are complex and intertwined. Viewing each aspect in a vacuum would create an unbalanced and incomplete solution that ultimately would pull the plug on the Internet.

As leaders in our industries, we have made our concerns about S. 1284 known in both chambers of the Congress. We would also like to take this opportunity to voice serious concerns about the Administration's expedited timetable for international negotiations on these digital copyright issues at the World Intellectual Property Organization. As you may be aware, the House of Representatives held hearings in February on copyright law in a digital environment, and subsequently leaders of the House Committee on the Judiciary asked us to participate in negotiations with the copyright owner community to try to find common ground. A number of us have been included in those formal negotiations, and much has been gained as we have better come to understand each other's needs, fears, and practical limitations. As might be expected, there still are key points of difference, but the talks are ongoing, and all sides are working in good faith.

Through this process, the members of our coalition have become convinced that any successful solution must be practical, reasonable, and fair. In order to convey what we mean, let us briefly review the essential characteristics of the NII as they apply to this discussion:

The Internet is a rapidly expanding linkage of networks that interface through common technical standards, but which are not centrally controlled.

The volume of digital data transmitted over the Internet is enormous: in the United States portion of the Internet alone, over 500 million messages of all kinds transit the networks daily. Messages posted to bulletin boards exceed 100,000 per day, just on those boards hosted on the major on-line companies' server computers.

Messages that are transmitted over telephone network-life facilities as digital ones and zeros cannot be interpreted until they are assembled at their destination by computers and decoded. Carriers do not and cannot know if the data files contain text, music or images.

The only party who has total control over what he or she sends or receives over the NII is the end user. The other parties to the information transfer are able to exercise control only as technology and the laws of privacy permit.

Original materials are now copyrighted without any obligation to register with the copyright office, and there may be no way for service and infrastructure providers to know who owns copyrighted material, who holds a valid license, and who objects to free or promotional access to that material.

Likewise, it is important to understand who the providers are: infrastructure or "backbone" providers furnish the lines, switches, routers, and other facilities for the NII. They carry vast numbers of communications at a time. Internet access providers connect individuals, businesses and other organizations with the Internet backbone, and generally offer basic software tools enabling their customers to send and receive messages. The developers of this software provide web browsers, search engines, directories and other products that make the Internet and its World Wide Web subset readily accessible to users who are not computer experts. And on-line services typically supplement Internet access with extensive original and licensed content, such as financial, news, travel and entertainment products, available only to their subscribers.

It has been said that the boundaries between these actors are in constant flux, and that the Congress ought not to try to address on-line liability at this time. However, the current categorization of these players is not where the Committee should focus its attention. Instead, one must look at what functions these actors provide, particularly with respect to control of content. Under a proper analysis, it is clear that liability should depend on functional factors, and these will not change as the outward forms of the players evolve in response to competitive forces. In other words, if we look at an on-line service provider, different responsibilities—and liabilities—should apply to its actions as a mere conduit, as a provider of content it posts for use by its members, or as a provider of Chat rooms and other areas where third parties may post content that rests on the provider's computer server. The Congress can craft rules for these different functions, and they will remain reasonable and applicable even as the industry itself evolves.

Finally, we cannot afford to lose sight of the key actor in this drama: the end user of the NII. Individual Americans have an unprecedented stake in the expansion and perfection of the NII—it is the most startling current example of actual "empowerment" we know of. On the other hand, problems cited by copyright owners are almost always the result of infringements by individuals, and it is with the Internet users that the Congress must focus the primary legal responsibility.

As we have stated before, the members of our coalition want an NII copyright bill as much as the copyright owners themselves. And we hope they, and the Committee, will agree that the solution must be a system in which responsibility is reasonably and fairly shared among all parties, and where liability is restrained by common sense. Already, a consensus is evolving on many points: we agree that there should be heightened respect for copyright among users of the NII. In the context of an overall agreement on the responsibility and liability issues, we stand ready to explore together with copyright owners the development and deployment of educational programs which may reduce the potential for infringement. We are willing to develop with them a system for removing allegedly infringing materials from sites and services under our control, given proper notice and protection from liability.

However, there are three key principles which must be reflected in any practical, workable solution:

Service providers and system operators must not be held liable for any copyright infringements when they provide mere conduit services.

Providers of trunk line or other backbone services should not be held liable for infringements. Nor should liability attach to those who provide, over their systems or networks on behalf of users, transmissions that do not involve the generation or alteration of the content (including processing, intermediate storage necessary for the operation for the network, and access software that enables users to access information of their choosing).

Service providers must not be required to "police" or "monitor" transmission.

The sheer volume of transmissions, digital technology, and privacy rights of users make it impossible and impractical for service providers to perform this function without imposing huge costs on them, slowing electronic communications to a snail's pace and seriously impinging on personal privacy.

There must be a mandatory notification and "take down" process.

Copyright owners (or their agents) are the only ones with sufficient knowledge of who owns given works, who has licensed what rights, and who objects to free or promotional access. They must have the obligation to identify content that infringes their copyrights and to notify on-line service providers of copyright infringements. And service providers must remove the infringing material within a specified period of time or face liability.

In conclusion, we understand well the problems faced by copyright owners. All the coalition members hold significant copyrights vital to our business. Some copyright owners seem to see only the downside risk from exposure to electronic distribution, as perhaps they did with the advent of VCRs. Others recognize that counterbalancing the inevitable potential for infringement, which occurs daily in all media, is an unprecedented opportunity for reaching millions of additional people at very little cost. At least, that is the opportunity if we don't so tightly bind the Internet that we choke off its promise.

And it is quite possible that new technologies will address the issues copyright owners care most about. As we meet today, innovative companies are working on watermarking and other copyright protection technologies that may limit unauthorized use and provide mechanisms for automatic payment for access.

However, we do not suggest that the Committee should wait to see if these technologies mature. We need a workable legal framework for today's environment. And we believe we have set forth principles that will allow the crafting of a function-based system that will provide flexibility as the NII develops. But we cannot move

forward without a resolution of the key issues we have discussed here. By its terms and operations, S. 1284 establishes responsibilities and liabilities in the copyright arena for all our members. This is the proper time and vehicle to consider how those duties and liabilities actually will work, and to make the resulting system practical, reasonable and fair.

Again, on behalf of the Ad Hoc Copyright Coalition, I thank you for this opportunity to present our views. We urge you to consider the legitimate needs and interests of all interested parties, especially the public. We would be delighted to assist you in your inquiry, and we offer to provide any technical demonstrations you may find useful. I would welcome the opportunity to answer any questions you have, and I have brought with me today individuals representing coalition members who may be able to reply with more expertise to specific inquiries.

AD HOC COPYRIGHT WORKING COALITION

Amdahl Corporation, America Online, Inc., Ameritech, AT&T, Bell Atlantic, BellSouth Corporation, Broadcast Production Group, Commercial Internet eXchange, Compuserve, Computer and Communications Industry Association, Dun & Bradstreet, Electronic Messaging Association, GTE, Information Technology Association of America, Interactive Services Association, ManyMedia, MCI Communications Corporation, Multimedia Telecommunications Association, National Retail Association, Netcom On-Line Communication Service, Inc., Netscape Communications, NYNEX, Pacific Telesis Group, Prodigy, SBC Communications, Southern New England Telephone, Sprint, Spyglass, Inc., The Internet Company, United States Telephone Association, and US WEST, Inc.

The CHAIRMAN. Mr. Oakley, we will go to you.

STATEMENT OF ROBERT L. OAKLEY

Mr. OAKLEY. Thank you, Mr. Chairman. I appreciate that last comment because that is precisely what the Digital Future Coalition [DFC] hopes to be able to do, is to work with you to craft the appropriate language.

My name is Robert Oakley, and continuing the theme that was initiated by the colleague to my left, I can tell you that I grew up in Provo and was a frequent user of the Provo Public Library as a youngster, not to mention the Salt Lake City Public Library.

The CHAIRMAN. Well, I didn't think you were all bad, I will tell you. [Laughter.]

Mr. OAKLEY. Mr. Chairman, we certainly appreciate your leadership in introducing this bill, as you said in your opening remarks, to begin the discussion of this important issue. I am honored today to appear on behalf of the Digital Future Coalition not only to discuss the group's views on copyright, but also to offer for the record a specific seven-point package of amendments to S. 1284. Necessarily, my remarks here will have to be brief. We request, therefore, that our full statement and proposals be included in the record of the hearing.

The CHAIRMAN. Without objection, they will be.

Mr. OAKLEY. Thank you, Mr. Chairman.

The DFC is a large and diverse group of individuals and organizations. We came together following the release of the White Paper last fall because of concerns we had about the proposals and the impact they would have on education and learning, privacy, and even the development of technology and the NII itself.

As a coalition, we are most simply over two dozen distinct organizations with a cumulative membership of over 2 million Americans. We are also, through our organizational members, major technology and telecommunications corporations; unionized writers and educators; the Nation's school boards and libraries; nationally

recognized consumer advocates; scholars and teachers of many disciplines, including intellectual property; and leading experts on privacy, the first amendment, and on information technology's pitfalls and potential.

Mr. Chairman, the members of the DFC are committed to a balanced copyright law, and that is a point that I wish to stress. The members of the DFC do not support piracy. We do not, however, think that a few horror stories are an appropriate basis for public policy.

Much of what we have seen here this morning is unlawful now, and we agree that that is the case and we agree that appropriate steps must be taken to deal with that issue. Indeed, we heard from the first speaker that they are, in fact, taking appropriate steps where there are concerns about piracy.

As creators ourselves, we understand that creativity results not just from financial incentives, but also from the statute's assurance of access to copyrighted information. Our coalition believes that in crafting the legislation, Congress should bring all of the critical precepts at the core of copyright law into the digital future together and in balance.

In practical terms, that means that if the nature and scope of rights granted to copyright holders is to be clarified or expanded, then the nature and scope of one of the primary counterbalances to those rights, the fair use doctrine, must be made equally clear. It means that the ability of Americans to rely on and use copyrighted information is not quietly precluded by over-broad restrictions on the manufacture of devices and systems needed to make fair use rights real.

It also means, Mr. Chairman, that Congress must deal directly in this legislation with the issue of who should be liable, when, and to what extent if a commercial, academic, or library computer network carries copyrighted information without the author's permission, as we saw in the last demonstration.

Beyond these specific concerns with the legislation, the Digital Future Coalition is also concerned, Mr. Chairman, that activities by the executive branch in the international arena could moot the legislative branch's policymaking prerogatives in this important area of law. Proposals virtually identical to those now before this committee have already been presented by the U.S. delegation to the World Intellectual Property Organization. That group has just recently confirmed that it intends to continue to call for a diplomatic conference to draft treaty language prior to the end of this year which would, in effect, codify the pending legislation in international law.

The DFC believes that the Framers would take a dim view of such de facto preemption of Congress' sole authority to make copyright policy. That possibility now looms large on the international horizon, however. Accordingly, Mr. Chairman, we urge you and the Senate to send a strong message to the executive branch that they should no longer pursue this agenda until a greater consensus is reached through the discussion and development of this legislation.

Turning now to the DFC's specific legislative proposals, the coalition proposes that new provisions concerning fair use and first sale doctrines, distance education and ephemeral digital reproduction of

copyrighted works be added to S. 1284. We propose that section 1201 regarding circumvention of copyright protection systems simply be stricken from the bill, in favor of technology-specific solutions based, wherever possible, on negotiated solutions to the threat of piracy, and that proposed changes in 3 of the remaining provisions of the legislation be modified to better assure that the critical balance in copyright law is maintained. Those provisions concern library preservation activities in section 108 and copyright management information covered by section 1202.

We believe, Mr. Chairman, that these proposals are consistent with the basic spirit of the bill to devise a copyright system for the digital age that protects the rights of copyright owners, but is also equitably balanced with the needs of information users.

Mr. Chairman, the members of the DFC are creators of copyrighted works, as well as consumers of information. As such, we believe strongly in the importance of providing appropriate copyright protection in cyber space for large content providers and individual authors alike. The new transmission right included in S. 1284 may be an appropriate means to this end. As we have indicated, however, the DFC is gravely concerned that the codification of that right without other compensating adjustments to the Copyright Act may miscalibrate the traditional balance of interests reflected in the Copyright Act today.

Mr. Chairman, I want to thank you on behalf of the Digital Future Coalition for the opportunity to appear before you today. Thank you.

The CHAIRMAN. Thank you, Mr. Oakley.

[The prepared statement of Mr. Oakley follows:]

PREPARED STATEMENT OF ROBERT L. OAKLEY

Good morning, Mr. Chairman, Sen. Biden, and Members of the Committee. My name is Robert Oakley. I am a Professor of Law at the Georgetown University Law Center and Director of the Law Center's Library. I also serve as Washington Affairs Representative for the American Association of Law Libraries, a member of the Digital Future Coalition.

I am honored and pleased to appear before the committee today on behalf of the Digital Future Coalition to share with you not only our large and diverse group's broad views on copyright and the National Information Infrastructure ("NII"), but to offer for the record a specific, seven-point package of amendments to S. 1284. The DFC respectfully requests that its proposals be considered and incorporated into S. 1284 before that legislation is reported out of this Committee.

INTRODUCTION

Before detailing the DFC's legislative package, Mr. Chairman, it is important that the Committee know who and what the Digital Future Coalition is, and what we stand for. If I may say, our very existence and the diversity of our membership are testimony themselves to the importance, breadth and complexity of the issues raised by S. 1284.

The Digital Future Coalition includes many public and private organizations that have been instrumental in building, and that will continue to expand, the Internet and broader NII now emerging.

We are, most simply, over two dozen distinct organizations with a cumulative membership of well over 2 million Americans.

We are also, through our organizational members: major technology and telecommunications corporations; educators; the nation's school boards and libraries; nationally recognized consumer advocates; scholars and teachers of many disciplines, including intellectual property; and leading experts on privacy, the First Amendment and on information technology's pitfalls and potential.

We are—to a member—corporations and organizations with a bedrock commitment to intelligent and balanced copyright law made after substantial scrutiny by

Congress. That means on the one hand, Mr. Chairman, that we respect and support strong copyright protection and, on the other hand, that we are committed to equally strong statutory respect for the Constitutional objective that undergirds all of copyright law: "the Progress of Science and useful Arts," and to the principle of Fair Use.

We agree that copyright is at root about promoting creativity. As creators ourselves, however, we understand that creativity results not just from the financial incentive for authors and inventors codified in Title 17 of the U.S. Code, but from that same statute's guarantee of access to copyrighted information. The truest and best measure of our copyright law's success is whether it succeeds in fairly balancing those equal priorities in the service of the Framer's commitment to the broad dissemination of knowledge and information in a Democracy.

OVERVIEW OF PROPOSALS

The Digital Future Coalition understands, Mr. Chairman, that you, Sen. Leahy and this Committee are eager to get down to the "brass tacks" of assuring that the development and marketplace deployment of 21st century information technology is not hindered by a 20th century statute. The DFC wishes to be absolutely clear that it shares that goal.

Our Coalition is also convinced, however, that—in pursuit of that end—Congress now has an opportunity (and a responsibility) to bring all of the critical precepts at the core of copyright law into the digital future together and in balance. In practical terms:

That means that, if the nature and scope of the monopoly rights granted to copyright holders is to be "clarified" by changing the U.S. Code, then the nature and scope of a key counterbalance to those rights—the Fair Use Doctrine—must be made equally clear in the law;

It means that, even as the Fair Use Doctrine is philosophically reaffirmed, Congress must practically assure that the continued ability of Americans is business, academia and the public at large to rely on and use copyrighted information—and to develop new business models for its distribution—are not precluded by overbroad restrictions on the manufacture of devices and systems needed to make fair use rights real;

It also means, Mr. Chairman, that Congress must deal directly in S. 1284 with the issue of who should be liable, when, and to what extent if a commercial, academic or library computer network carries copyrighted information without the author's permission. Without increased certainty in this critical area of the law, however, both commercial and non-commercial use of the NII and GII will be dramatically chilled by the potential for crippling litigation and liability.

PRECLUDING PREMATURE INTERNATIONAL ACTION ON A "DIGITAL AGENDA"

The Digital Future Coalition is also critically concerned, Mr. Chairman, that—unless checked—activities by the Executive Branch in the international arena could moot the Legislative Branch's policy making prerogatives in this critical area of the law. proposals virtually identical to those now before this Committee have already been presented by the U.S. delegation to the World Intellectual property Organization by the United States' delegation, which confirmed just days ago that it intends to continue to call for a diplomatic conference to draft treaty language prior to the end of this year which would, in effect, codify the pending legislation in international law.

That call will next be heard from the U.S. delegation in Rome starting tomorrow as the "Stockholm Group" of industrialized nations meets for three days to consider and potentially endorse the U.S. agenda for a December 1996 diplomatic conference to be held in Geneva. The Governing Body of WIPO itself will meet in Geneva on May 20, less than two weeks from now, to cast plans for the conference in concrete. The DFC believes that the Framers would take a dim view of such de facto preemption of Congress' sole authority to make copyright policy. That possibility, however, now looms large on the international horizon.

Accordingly, Mr. Chairman, we urge you, the Committee and the Senate to immediately send a strong message to the Executive Branch that: (1) the Administration's "Digital Agenda" is premature for consideration by WIPO pending the formation of a domestic consensus and the conclusion of Congressional action on the legislation before us; and (2) the United States' delegation to WIPO should work affirmatively to assure that any such "Digital Agenda" is not placed before a 1996 or early 1997 diplomatic conference intended to amend the Berne Convention for the first time in 25 years.

LEGISLATIVE PROPOSALS

Turning now to the DFC's specific legislative proposals, I would like to request, Mr. Chairman, that they be incorporated in the record of these hearings at the conclusion of my remarks, together with relevant explanatory materials. These proposals, for the record, have been expressly endorsed by the undersigned members of the Digital Future Coalition. Thank you, Mr. Chairman. In sum, the DFC proposes: that new provisions concerning the Fair Use and First Sale Doctrines, distance education and ephemeral digital reproductions of copyrighted works be added to S. 1284; that Section 1201, regarding "Circumvention of Copyright Protection Systems," simply be stricken from the bill in favor of technology-specific solutions based on negotiated solutions among those most concerned; and that proposed changes in two of the remaining provisions of the legislation be modified to better assure that the critical "balance" in copyright law just described is maintained. (Those provisions concern preservation activities addressed in Section 108, and "copyright management information" systems covered by new Section 1202.)

In addition, the undersigned DFC members urge the Committee not to approve S. 1284 unless and until it is amended to clarify and define the scope of network service providers' liability under the Copyright Act in a manner that does not require or encourage such providers to compromise the privacy rights of their users.

For the Committee's convenience, I will address the undersigned DFC members' proposed amendments in the order of the statutory sections to which they relate, beginning with Section 106 of the Copyright Act.

SECTION 106: EPHEMERAL DIGITAL REPRODUCTIONS

As introduced, S. 1284 would amend Section 106 of the Copyright Act to provide for a "transmission" right as an aspect of the "distribution" right already identified in subsection (3). If such a right is made explicit in the Act, however, further clarification of the statute is needed to assure that the mere act of reading a digital document will not constitute copyright infringement.

Such liability could well be imposed if the new transmission right is interpreted by courts to support a finding that every temporary reproduction of a work in a computer's random access memory (RAM) or "cache" storage (incidental to its use on a computer system) is a technical "copy" for all purposes under the Copyright Act. Under this construction of the law, activities that can now be undertaken without risk of liability of the analog environment would become a potential source of liability in the digital one.

While a few courts have considered "RAM" reproduction to be "copying" under the Copyright Act (see particularly Ninth Circuit decisions, such as *MAI* v. *Peak,* 991 F.2d 511 [1993]), this interpretation has been substantively addressed only in a few jurisdictions and has not been reviewed by the Supreme Court. It is, therefore, far from being settled law. It is, however, one of the central tenets of the White Paper on "Intellectual Property and the National Information Infrastructure" and thus clouds all discussions of rights and wrongs in cyberspace.

The "NII Copyright Protection Act" offers the Congress an opportunity to definitely clarify that the mere fact that a work in digital form is loaded into the random access or cache memory of a computer—creating temporary electronic versions of the work destined for automatic erasure—does not constitute the sort of "copying" with which the law of copyright is now or need be concerned. Accordingly, the DFC proposes that—in addition to modifying Section 106(3)—S. 1284 be broadened to amend the description of the "reproduction right" in Section 106(1) of the Copyright Act as follows:

For the purposes of this subsection, the ephemeral reproduction of a work in temporary computer memory or digital storage, which is incidental to the otherwise lawful use of that work, and which does not lead to the making of a permanent reproduction, is not a copy. This language is intended to apply only to necessary and incidental reproduction of digital works in connection with their use on computer systems. It will have no application to situations in which permanent electronic copies, such as those made on a computer's disks (or other permanent or semi-permanent storage media) are made.

SECTION 107: FAIR USE

As noted earlier in these remarks, it is critical that the copyright law strike an appropriate balance between protecting the rights of copyright owners and otherwise promoting "Progress in Science and the useful Arts." In the scheme of American copyright, "fair use" safeguards our collective interest in the flow of information—which is, in turn, a source of economically valuable knowledge.

Fair use, in addition to reflecting in copyright law First Amendment-based principles of free speech, provides the basis for many of our most important day-to-day activities in scholarship and education. Moreover, it is no less vital to American industries, which lead the world in technological innovation. It is also of tremendous value to the Judiciary in dealing with the challenge of precisely such innovation, and repeatedly has been recognized by the Supreme Court as essential to the work of writers and others who creatively transmogrify the earlier works of others in the alchemy that we call "Art.".

The maintenance of a robust Fair Use Doctrine in the new legal environment of cyberspace thus remains a high priority of the Digital Future Coalition, and, we respectfully submit, should rank among Congress' highest priorities, as well.

S. 1284 proposes to "clarify" that transmission is a form of distribution under the Copyright Act, one of the "bundle of rights" granted to copyright holders by Section 106 of the Act. Many also consider the proposed language an expansion of those rights. Under either interpretation, the Digital Future Coalition believes that a comparable change is necessary and appropriate in the "Fair Use" portion of the statute (Section 107) in order to assure that the scope of fair use parallels the scope of the rights to which it relates. Including such language in the pending legislation and the Act also will reaffirm Congress' commitment to the vibrancy of the Fair Use Doctrine in the digital future.

To those ends, the DFC proposes that the introductory paragraph of Section 107 be amended to read as follows (with proposed new language indicated by italics):

Notwithstanding the provisions of Sections 106 and 106A, the fair use of a copyright work, including such use by reproduction in copies or phonorecord, *by transmission,* or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright.

SECTION 108: LIBRARY EXEMPTIONS

The transformation of the information environment gives rises to both challenges and opportunities for many important social institutions, including libraries. The undersigned members of the Digital Future Coalition agree with you and Sen. Leahy, Mr. Chairman, that a "digital update" to Section 108 of he Copyright Act is required if the needs of libraries and researchers are to be met. Moreover, such an update is vital to libraries' ongoing and uphill efforts to solve a preservation problem which now ranks as nothing short of a national intellectual and historical crisis.

The Digital Future Coalition supports technical revisions to S. 1284 advanced by several of its member organizations (the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association) and supported by the Register of Copyrights. These revisions would make Sec. 108 "technology-neutral" throughout, thus allowing libraries to use the best and newest technology platform to carry out the activities authorized by Section 108.

Our proposal would also add an important new subsection designed to help the library community meet the special preservation challenges posed by digital works in obsolete formats (*i.e.*, works which can no longer be accessed by the technologies that produced them because such technologies are no longer reasonably available).

Specifically, the DFC proposes that Section 108 be revised in a manner largely consistent with S. 1284 to read as follows: (proposed new language in italic; deletions in square brackets):

(a) except as otherwise provided, notwithstanding the provisions of Section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phono-record, under the conditions specified by this section, if—

[Subsections 1 and 2 remain unchanged];

(3) the reproduction or distribution of the work includes a notice of copyright if such notice appears on the copy or phonorecord that is reproduced under the provisions of this section.

(b) The rights of reproduction and distribution under this section apply to [one copy] *three copies* or phonorecords of an unpublished work duplicated [in facsimile form] solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The right of reproduction under this section applies to [one copy] *three copies* or phonorecords of a published work duplicated [in facsimile form] solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or *if the existing format in which the work is stored has become obsolete,* if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

SECTION 109: THE FIRST SALE DOCTRINE

It has long been recognized in American law that someone who legally obtains a book or video cassette, for example, may—without the permission of the owner or fear of liability—give, sell or otherwise transfer possession of that work to someone else. Library lending, for example, is a direct outgrowth of this "First Sale Doctrine" now codified at Section 109(a) of the Copyright Act.

The Digital Future Coalition rejects the suggestion, make in the report on "Intellectual Property and the National Information Infrastructure" (produced by the Working Group on Intellectual Property Rights of the President's Information and Infrastructure Task Force) and elsewhere, that the First Sale Doctrine applies only to the physical transfer of an actual object and does not apply to the electronic transmission of a work under any circumstances. Such analysis, in any event, misses the critical point that Congress now has the opportunity to determined whether some digital equivalent to the traditional "first sale" doctrine, as it exists in the analog information environment, should apply in cyberspace. We believe that it should.

Historically, the ability to pass on lawfully obtained copies of works has been important to libraries, scholars, and ordinary information consumers. It has also been a crucial factor in the emergency of new business models. Just as "first sale" in the past has given us everything from lending libraries to video rental outlets, we believe that the digital equivalent of "first sale" could be the basis for important new cultural and economic developments in cyberspace. One means to that end would be to add to Section 109 of the Copyright Act the following new subsection:

(f) The privilege set forth in subsection (a) extends to any transmission of a single copy or phonorecord so long as the transmitter erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of a work, to the extent required to exercise this privilege, is not an infringement.

If adopted, this proposal would codify a standard with which responsible users of the NII may reasonably be expected to comply, and one which would be no more difficult to enforce than a flat prohibition on all retransmissions of lawfully acquired digital copies of copyrighted works. Indeed, content providers could take advantage of increasingly sophisticated technological means to make it difficult, if not practically impossible, to forward such copies without simultaneously deleting them.

SECTIONS 110 AND 112: DISTANCE EDUCATION

"Distance Education" is one of the most exciting and potentially productivity-enhancing trends in American education today. Using television and other technologies, educators are increasingly able to deliver non-profit educational services critical to success in the global economy to students in rural communities, disabled individuals, adults enrolled in continuing education programs, and many other special communities of learners. Literally millions of Americans benefit from these efforts. The Digital Future Coalition is concerned, however, that if the current law and pending legislation are not modified, the tremendous educational and social benefits of distance learning will be lost to millions of children and adults across the nation.

Students today enjoy the benefits of distance education in large part because of provisions contained in Sec. 110(2) of the Copyright Act of 1976, which allow for the "performance or display" of certain works delivered by means of "transmission" in non-profit educational settings. Today, that typically means television. Increasingly, however, distance educators will want and need to make use of digital transmissions over local networks and the Internet in order to maximize the reach and effectiveness of their services.

Under S. 1284, however, Sec. 106(3) of the Copyright Act would be amended to define transmissions of copyrighted works by means of digital networks as "distributions" of copies. The existing exemptions for education in Sec. 110, however, do not apply to the "distribution right." S. 1284, as written, thus promises to clarify and expand the rights of copyright proprietors while narrowing the continued ability of distance educators (in both government and non-profit institutions) to use the latest and best technology to carry on their crucial work.

Furthermore, unlike the broadcast technologies of the mid-1970's, digital networks make it possible to deliver distance non-profit educational services to students individually and outside traditional classroom settings through individual computer terminals. At present, however, the locations to which educators may deliver "distance ed" programming are limited under Sec. 110(2) of the Copyright Act. Moreover, the limitations of the Sec. 110(2) exemptions to certain classes of copyrighted works are increasingly outdated in an era of digital "convergence" and "multimedia" presentations.

Ideally, the best way to assure that the technologies of learning continue to flourish in the digital age would be to engage in a comprehensive rethinking of relationship between educational practice and copyright, starting from first premises. Such an effort, however, would take time. If there is to be legislation in the near term to adapt copyright to the networked information environment, the undersigned DFC members believe it is essential that any such legislation include language that addresses these important distance education issues.

Specifically, the DFC proposes amending Sec. 110(2)—and its companion Sec. 112(b)—to bring distance education into the digital age by adding "distribution" to the list of conditionally exempt educational uses. Sec. 110 should be further updated by eliminating current restrictions the kinds of places in which exempt transmissions may legally be received, and on the kinds of works subject to the exemption. Finally, to help assure that these provisions are not abused, the DFC also proposes new restrictive language which would limit the scope of Sections 110 and 112 to transmissions primarily intended for the use of "officially enrolled" students. As modified according to our suggestions, Secs. 110(2) and 112(b) would read as follows:

Section 110(2):

(2) performance, display or distribution of a work by or in the course of transmission—if

(A) the performance, display or distribution is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution, and

(B) the performance, display or distribution is directly related and of material assistance to the teaching content of the transmissions, and

(C) the transmission is made primarily for reception by students officially enrolled in the course in connection with which it is offered, or

(D) the transmission is made primarily for reception by officers or employees of governmental bodies as part of their official duties or employment;

Section 112(b):

Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to perform, display or distribute a work by or in the course of a transmission, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a) to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance, display or distribution, if—

[The balance of the statute as in the original.]

PROPOSED SECTION 1201: CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS

The Digital Future Coalition does not take lightly, and does not believe frivolous, the concern of many in the entertainment and information industries that digital technology creates new dilemmas. The DFC does, however, take strong issue with the suggestion that proposed Section 1201 is an appropriately measured and balanced response to this concern.[1]

As representatives of entertainment industries now readily admit, similar concerns over technological innovation have proven unfounded in the past. Originally viewed as a deadly threat to the motion picture industry, for example, the VCR actually spawned a new and previously unenvisioned market for that industry which now accounts for the majority of its domestic revenues.

Despite that experience (and positive experience in the past with narrow device-specific "black box" prohibition laws aimed at satellite signal piracy) the NII Working Group has offered Congress a vague and sweeping provision—one which would, in effect, overturn the Supreme Court's decision that made the VCR industry viable

[1] Proposed Section 1201 is premised on the notion that technological means of protecting copyrighted works from misappropriation are (and will remain) easily defeated and, thus, inadequate. While the intention of the proposal is laudable, this premise is simply incorrect. As many members of DFC-affiliated organizations would be pleased to detail for the Committee in future hearings, technologies which effectively provide strong protection against unauthorized reproduction now exist, are extraordinarily difficult to crack, and are becoming more so every day.

and established the public's fair use right to "time shift" programs by recording them for private use.

In the *Betamax* decision, the Supreme Court held that because the Betamax is "capable of substantial noninfringing uses, * * * Sony's sale of such equipment to the general public does not constitute contributory infringement of respondents' copyrights." Since Section 1201, as drafted, could outlaw devices that have substantial noninfringing uses if they do not also respond to all anticopying technology, we believe it reverses the Supreme Court's decision.

Moreover, because Section 1201 covers components as well as devices, it could be used by courts to outlaw entirely the sale of a variety of products including recording devices with substantial noninfringing uses. Such products should not be expected to comply with anti-copying encoding that would prevent fair use copying, would distort regular TV pictures, would require expensive licenses, or otherwise would frustrate consumers.

Members of the DFC do not advocate allowing consumers to circumvent properly protected copyright works through such systems as "black boxes" that have no commercially significant use other than to circumvent copy protection. But our members do support the right of consumers to continue to make legal, fair use reproductions of copyrighted works. We therefore recommend that Congress not adopt Section 1201. Rather, we urge Congress, working with concerned industries, to address copying issues on a more specific basis in terms of devices and technologies.

Technically expert DFC member organizations look forward to sharing with the Committee additional information regarding the viability of relying on technology to guard against the unauthorized use of copyrighted digital works in a manner consistent with the Fair Use Doctrine.

SECTION 1202: COPYRIGHT MANAGEMENT INFORMATION

The Digital Future Coalition is similarly concerned that proposed Section 1202, as incorporated in S. 1284, goes too far in attempting to further the laudable purpose of counteracting piracy by forbidding the misrepresentation of "copyright management information." Clearly, the development of systems and programs intended to provide consumers and other information users with information about who holds the rights to a copyrighted work, how to contact the rights holder, and (if permission to use the work is legally required) under what terms it may be obtained are not inherently objectionable. Penalizing individuals who remove or alter such information in order to further actual copyright infringement also seems appropriate.

As drafted, however, proposed Section 1202(a) also would penalize a potentially wide range of non-infringing activities. For example, a legitimate wholesaler which acquired several thousand copies of a copyrighted book or videotape each of which included accurate "copyright management information" (CMI) at the time of the acquisition might subsequently learn through the trade press that the rights to those works had been transferred as part of a major corporate acquisition. Under Section 1202(a), because the wholesaler knew that the CMI imbedded in each copy in his inventory had now been rendered "false" by market events outside its control, he or she would risk liability for redistributing them in the normal course of otherwise lawful business activities. Similar liability would be faced by libraries and educators.

This certainly unintended result would obtain because the only requirement for liability under Section 1202(a) is mere knowledge that false CMI has been distributed. Nonsensically, the distributor's intent and the reason that the information is or become inaccurate are irrelevant.

Section 1202(b), by contrast, speaks to the true heart of the problem—the wrongful alternation or removal of such information. By incorporating a similar concept in Section 1202(a) the inadvertent sweep of the provision will be appropriately narrowed. Specifically, we propose that liability for transmitting false copyright management information be imposed only on those who do so in furtherance of actual copyright infringement. So modified, Sec. 1202(a) would read as follows:

False Copyright Management Information.—No person shall knowingly provide copyright management information that is false, or knowingly publicly distribute or import for public distribution copyright management information that is false, in furtherance of infringement.

The DFC also is concerned that, by making the definition of "copyright management information" ("CMI") open-ended, S. 1284 effectively delegates to the Copyright Office the authority to define what will and will not be a criminal offense. Such determinations, the Coalition believes should continue to be made by Congress itself. In addition, if broadly defined, it is clear that CMI systems will be capable not only of providing information users with information about copyright propri-

etors, but will furnish such proprietors with data about the information user (see Chronicle of Higher Education, March 22, 1996, p. A23). Absent effective privacy safeguards (such as the development of anonymous payment mechanisms), serious privacy problems will result.

For both of these reasons, the DFC strongly urges that detailed hearings be conducted on the appropriate scope of the definition of CMI for purposes of the pending legislation. Not incidentally, such hearings also will afford authors an opportunity to be heard as to how CMI technology may best advance their significant interests in the digital information marketplace.

ON-LINE SERVICE PROVIDER LIABILITY

Finally, the DFC wishes to highlight for the Committee an additional issue of very substantial concern to its members. While we are not presently proposing a legislative solution in deference to ongoing multi-party negotiations, the Digital Future Coalition believes that S. 1284 should not be reported out of the Judiciary Committee (or, certainly, approved by the Senate) unless it is explicitly amended to define the circumstances under (and the extent to) which Internet access providers, bulletin board operators, libraries, educational institutions, and other system operators will be held liable for violations of the new "transmission" right for copyright infringement by subscribers and other end-users. Such legislation is needed for many reasons including the protection of privacy. Given the uncertain and fluid state of case law in this area, absent clear lines of liability service providers may have no practical defense to crippling damages but the invasive monitoring and supervision of their subscribers' private communications.

CONCLUSION

Like most participants in the networked information environment, the members of the Digital Future Coalition are creators of copyrighted works, as well as consumers of information. As such, we believe strongly in the importance of providing appropriate copyright protection in cyberspace for large content providers and individual authors alike. The new "transmission" right included in S. 1284 may be an appropriate means to this end. As we have indicated, however, the DFC is gravely concerned that the codification of that right—without other compensating adjustments to the Copyright Act—may miscalibrate the traditional balance of interests reflected in the Copyright Act today.

Such imbalance not only threatens consumer interests and to inhibit or preclude the emergence of new business models in cyberspace, but also promises to retard the very "Progress in Science and the useful Arts" that led the Framers of the Constitution to grant Congress the power to award copyrights over two centuries ago.

The undersigned members of the Digital Future Coalition appreciate this opportunity to present our views on S. 1284. We look forward to working with the Committee and its staff to craft legislation which honors the Constitution by reaffirming and guarding the balance at copyright's core.

Thank you again, Mr. Chairman.

Alliance for Public Technology.
American Association of Law Libraries.
American Committee for Interoperable Systems.
American Council of Learned Societies.
American Historical Association.
American Library Association.
Art Libraries Society of North America.
Association of American Geographers.
Association of Research Libraries.
Committee of Concerned Intellectual Property Educators.
Computer & Communications Industry Association.
Conference on College Composition and Communication.
Consortium of Social Science Associations.
Consumer Federation of America.
Consumer Project on Technology.
Electronic Frontier Foundation.
Electronic Privacy Information Center.
Home Recording Rights Coalition.
Medical Library Association.
National Council of Teachers of English.
National Education Association.
National Humanities Alliance.
National School Boards Association.

People for the American Way Action Fund.
Special Libraries Association.

The CHAIRMAN. Mr. Burton, we look forward to taking your testimony.

STATEMENT OF DANIEL F. BURTON

Mr. BURTON. Thank you, Mr. Chairman. My name is Dan Burton. I am here representing Novell, Inc. Because my opening statement is short, I would like to request that the full statement be put into the record.

The CHAIRMAN. Without objection.

Mr. BURTON. I would also like to note that Novell had the foresight to open and begin its operations in the great State of Utah and has flourished there.

The CHAIRMAN. I hope you are all catching on to this. [Laughter.]

Mr. BURTON. On a serious note, we would really like to thank you for all the leadership you have shown not only with this bill, but for the software and high-tech industry, in general. We have appreciated that and continue to rely on it, so thank you very much. S. 1284 is extremely important to our company and to the computer industry in the development of both a national and global information infrastructure.

Novell is the world's leading provider of computer networking software. We therefore bring a unique perspective to the debate about copyright and the NII due to the mix of products and services that we offer. On the one hand, we understand the concerns of the content providers because we create software products. On the other hand, we are different from most content and application providers because our software is at the operating system level, providing the infrastructure for networking.

In fact, we are now offering a web server product that provides Internet access. We thus can appreciate the perspectives of the online service providers as well. With our background in networking and our understanding of the positions of many sides of the debate, we feel uniquely qualified to comment on this legislation.

Novell strongly supports S. 1284. This legislation affirms that copyrighted works are protected by the Copyright Act when they are transmitted over digital networks. It makes modest changes to the Copyright Act to confirm that the works which we and others spend millions of dollars and countless hours developing are protected on the information superhighway.

Before I turn to the bill, I would like to just make a few points about piracy. Pirated software used to consist mostly of counterfeit products such as this. This is a CD disk. In order to produce these types of counterfeit disks, you had to reverse-engineer or decompile the code. You had to set up a manufacturing facility to reproduce the disks. You then had to package the disk, establish a distribution system and, if you were going international, evade customs agents around the world to get these disks into the distribution system.

Novell and other software industries have aggressive programs to stop these pirate operations, but despite our effort, the cost of software piracy is anywhere from $10 to $15 billion a year, and most of these losses are felt by U.S. companies. Novell, in fact, we

think, suffers from the loss of $700 million a year due to software piracy.

The threat of piracy that we are talking about today is different, and these traditional disks and the damage done by that means of piracy are nothing compared to the damage that can be done by pirates on the Internet. Internet pirates do not need to reverse-engineer the source code or set up a manufacturing facility. The factory of a modern pirate consists of a computer and a modem.

When we were thinking of a symbol of that factory, this is what we came up with. It is a telephone wire. You can buy it at the hardware store for $1.99. You put a wire like this in with a PC and a modem and you are in business in your living room. You don't need a manufacturing facility, you don't need an extensive distribution system. With the click of a few buttons, a pirate can make an unauthorized copy of a work and disseminate it literally worldwide.

In order for the Internet to achieve its commercial potential, the owners of copyrighted products must be confident that by putting their creative works on the Internet, they are not creating an opportunity for wholesale piracy worldwide.

Now, let me just comment on a few provisions of the legislation. First of all, distribution by transmission. We support amendment to section 106 of the Copyright Act to specifically confirm that the distribution right encompasses digital transmissions. Although these changes essentially confirm the current status of the law, they send a loud and clear message that copyright protection is fully applicable in the digital world. Given the ease with which unauthorized copies of created works can be transmitted over electronic networks, recognizing that the distribution right can be implicated by means of a transmission is essential to protecting the rights of authors.

As far as copyright protection and copyright management information systems, we feel that by penalizing those who circumvent or defeat copyright protection in these copyright management information systems, this legislation takes an important step toward ensuring the rights of copyright owners in the digital world. Novell supports the approach to copyright protection systems adopted in S. 1284. Instead of mandating a specific technology, the legislation proposes a legal standard that is strong enough to deter violations. Novell believes that it is important to expand the coverage of this provision to prohibit the use of such devices and products, as well.

Novell also supports the provisions of S. 1284 that address copyright management information systems. We think making it illegal to remove, alter or falsify copyright information is appropriate and a far better solution to the concerns about piracy than requiring copyright owners to include specified copyright management information or mandating the use of specific technologies.

Before I close, I would like to make a comment about service provider liability because this is an area where Novell really sees both sides of the picture. Although the legislation does not address the issue of service provider liability directly, we think it is very important. Online and Internet service providers have sought amendments to S. 1284 to reduce their exposure to infringement liability. We recognize that it is technologically difficult for OSPs to screen

all of the information that comes across their systems and we understand their concerns.

On the other hand, they cannot simply wash their hands of any responsibility for ensuring that copyright is respected on their service. They are often in the best position to detect copyright infringements, and holding them responsible for infringements is consistent with the legal treatment of other distributors of copyright works. Companies such as Barnes and Noble, Tower Records, Egghead Software, Blockbuster Video similarly cannot realistically be expected to view all of the books, records, software and videos they sell. Yet, each of these entities may be subject to liability if the copies of works it sells are infringing.

We understand that these are difficult issues that are presently being negotiated. We endorse that process. However, if a legislative compromise cannot be achieved, then the enactment of S. 1284 should be delayed. While negotiations continue, the liability standards in existing case law are sufficiently flexible and fair to achieve a reasoned and just result in any cases that may arise.

I am pleased to offer Novell's support for this bill and happy to answer any questions.

[The prepared statement of Mr. Burton follows:]

PREPARED STATEMENT OF DANIEL BURTON

Mr. Chairman, Members of the Committee, I am pleased to appear before you today to testify on behalf of Novell, Inc. regarding S. 1284, the National Information Infrastructure Copyright Protection Act of 1995. My name is Daniel Burton and I am Vice President of Government Relations of Novell. This legislation is extremely important to our company, the computer industry, and the development of both a national and a global information infrastructure. Novell welcomes the opportunity to present its views.

Novell is the world's leading provider of computer networking software. Our business is about connecting people with other people and the information they need, enabling them to act on it any time, from any place. We probably have more experience with networking than any other company. We have been linking people and information together since 1983 with the first release of our NetWare® operating system. Out software has been fundamental to the establishment of hundreds of thousands of local area networks, wide area networks, and enterprise networks, and is now being used to connect these networks to one another and to global networks such as the Internet. Today, more than 50 million users in some 90 countries rely on Novell's NetWare® software to share resources, access information and increase productivity.

Novell brings a unique perspective to the debate about copyright and the National Information Infrastructure ("NII") due to the mix of products and services we offer. On the one hand, we understand the concerns of the content providers because our fundamental business is the creation of software products. At the same time, we are different from most content and application providers because our software is at the operating system level, providing the infrastructure for networking. Indeed, we are now offering a Web server product which provides Internet access. We thus can appreciate the perspectives of the online service providers as well. With our background in networking and our understanding of the positions on many sides of the debate we feel uniquely qualified to comment on this legislation.

Novell strongly supports S. 1284. This legislation affirms that copyrighted works are protected by the Copyright Act when they are transmitted over digital networks. Instead of uncertainty about the applicability of copyright protection to digital technology in the context of computer networking, this legislation makes modest adjustments to the Copyright Act to confirm that the works which we, and other creators, spend millions of dollars and countless hours developing are protected on the information superhighway.

Some critics of the legislation claim that Congress need do nothing to respond to the new challenges facing authors in cyberspace. Others think Congress should do significantly more than make the simple adjustments to the Copyright Act provided for in S. 1284. We believe both of these extremes are misguided.

Doing nothing would leave the biggest advance in computer communications in a state of legal uncertainty that is likely to deter creativity and the flow of information over the Internet. Congress must confirm that copyright is fully applicable to digital transmissions of works; and it must ensure that the technological mechanisms deployed to protect these works are neither circumvented nor ignored. Doing significantly more than that is neither wise nor necessary at this time. With minor amendments, the Copyright Act is fully capable of responding effectively to the needs of the NII.

For the information superhighway to achieve its full potential, authors and publishers of digitized works must be confident that their right to control access to and distribution of their works will be protected when the works are transmitted over networks. As Chairman Hatch so aptly explained at the joint House-Senate hearings held on this legislation last year, "no producer of intellectual property will place his or her works on the information superhighway if they are routinely pirated. We might end up having enormous access to very little information unless we can protect property rights in intellectual works." (Hatch Statement, Nov. 15, 1995).

The problems of piracy in a digital environment cannot be overstated. Its costs are staggering. Each year software theft costs the software industry an estimated $10–$15 billion worldwide. Most of these losses are felt by U.S. companies. We estimate that more than half a billion dollars of Novell's products alone are pirated or otherwise illegally copied each year.

Pirated software used to be sold mostly through conventional means, by distribution of counterfeit products. Novell's anti-piracy investigators have discovered counterfeit copies of Novell products in countries throughout the world. Just a few months ago, Novell filed lawsuits against 17 California firms for fraudulently obtaining Novell upgrades and counterfeiting NetWare® boxes. The altered upgrade products were found in countries as far apart as the United States, Indonesia, the United Kingdom and the United Arab Emirates. In other cases, we sued companies supplying pirated versions of NetWare® to vendors in the Middle East, and in the Netherlands for resale into Eastern Europe.

But the threat posed by this kind of counterfeiting is nothing compared to the damage that can be done by pirates on the Internet. The factory of the modern pirate consists of a computer and a modem. And the wire is his means of distribution. With the touch of a few buttons, a pirate can make an unauthorized copy of a work and disseminate it worldwide. He can post it on electronic bulletin boards and Web sites, where others can download copies at will.

Novell has discovered and successfully shut down some of the electronic bulletin boards making unauthorized copies of copyrighted software available to users. For example:

Novell, together with Microsoft, successfully pursued a bulletin board system called "Assassins' Guild BBS" that was illegally distributing hundreds of commercial products from dozens of different manufacturers.

Two other operators of bulletin boards were sentenced after it was discovered that their bulletin boards, "The Hammermill" and "The Clone Zone," each contained more than 700 illegally copied programs with a retail value in excess of $80,000.

Not every pirate looks the part. In 1993, FBI officials and Novell investigators searched the home of a middle-aged couple in Boardman, Ohio who were reportedly operating an illegal bulletin board from their home. Federal agents confiscated over 122 phone lines, 150 computers, and related telephony equipment. The couple admitted to illegally distributing over $1.3 million worth of copies of software products, including Novell's NetWare® software.

These cases represent only a small fraction of the violations that occur. Tracing piracy on the Internet is particularly complex since it is not restricted by geographic boundaries. For example, our anti-piracy group has been tracing a Canadian resident's use of a Web site to market Novell software to residents of the United Kingdom, which the individual purchaser would download from a File Transfer Protocol site located in Switzerland. In addition, pirates are using increasingly sophisticated techniques to circumvent our copyright protection systems. For example, Novell is currently in litigation with a company in Liechtenstein who has developed a product which permits circumvention of the serial number technologies embedded in Novell products to help prevent copyright infringement.

Mr. Chairman, we must not allow the Internet to become a back door to our company's creative and financial resources. This new medium has enormous potential as a new outlet for the distribution of copyrighted works, from text and computer programs to sound recordings and video games. It offers a far more efficient means of conducting commercial transactions worldwide than the conventional marketplace. Already the Internet has an estimated 30 million users throughout the world, and more and more companies and individuals are joining this network each day.

In order for the Internet to achieve its commercial potential with respect to proprietary works, however, the owners of such works must be confident that by putting their creative words on the Internet they are not creating an opportunity for wholesale piracy worldwide. Only in a transmission environment fully protected by copyright law will they be able to participate in this brand new marketplace.

We must respond to the challenges of the NII, but we must not overreact. Meeting the challenges of the Internet requires fine tuning, not an overhaul or abandonment of the Copyright Act in cyberspace. Our copyright system has been designed to be flexible enough to respond to the competing needs of authors and users, and it can be equally in the context of the NII. We believe that, with the amendments set forth in this legislation, the Copyright Act will pave sound "rules of the road" for the NII.

Let me now briefly summarize our views with respect to several of the more significant aspects of the legislation.

I. DISTRIBUTION BY TRANSMISSION

Novell supports the amendment of § 106 of the Copyright Act to specifically confirm that the distribution right encompasses digital "transmissions" and the conforming changes to the definitions of "transmit" and "publication" in § 101 and to the importation right in § 602.

Although these changes essentially confirm the current status of the law, they send a loud and clear message that copyright protection is fully applicable in the digital world. Given the ease with which unauthorized copies of creative works can be transmitted worldwide over electronic networks, recognizing that the distribution right can be implicated by means of a transmission is essential for protecting the rights of authors.

Under existing law, authors of proprietary works have the exclusive right to control the reproduction, distribution and adaptation of their works and the ability to choose whether and to whom the works will be licensed. This right can only be assured in a digital environment if transmissions are encompassed within the distribution right, and authors are ensured the exclusive right to upload, download, access and transmit their works electronically.

We do not believe, as critics of the legislation have suggested, that expressly stating that electronic transmissions are within the scope of copyright protection will permit authors undue control over transmissions or paralyze the flow of information on the Internet. After all, the distribution right will remain subject to all the limitations and defenses currently available under the Copyright Act. These limitations, such as the fair use doctrine, sharply curtail the copyright owner's exclusive distribution rights, and there is nothing in S. 1284 that modifies anything in the fair use provision of the copyright law.

II. LIBRARY EXEMPTION

Novell recognizes the significant public functions libraries serve in American society and the importance of allowing libraries to collect and archive creative works. With computers and digitized information becoming an ever more important part of our lives and our children's educations, the need for library collections to keep pace with these developments is clear.

Accordingly, we agree that libraries should enjoy their special status under the Copyright Act and support in principle S. 1284's expansion of the existing exemption for libraries.

We note, however, that the special status conferred should be limited in scope to the legitimate needs of libraries. As the Copyright Office pointed out in the NII hearings last fall, the language of the current draft may need to be refined to ensure that the expanded exemptions for libraries do not exceed their intended purposes.

For example, we understand that the amendment to § 108 is intended to allow libraries the benefits of digital technology for use in preserving and replacing works. We support this goal, but agree with the Copyright Office that the increase in the exemption to three copies should be linked not to the general library reproduction and distribution right in Section 108(a), but only to the provisions in Sections 108(b) and 108(c) which deal directly with the preservation and replacement of copyrighted works.

We are also concerned that in the absence of clarifying language the library exemption may unintentionally lead to the widespread dissemination of protected works. Given the ease with which virtually identical copies of works in digital formats may be reproduced and disseminated, additional precautions on the distribution of such works by libraries may be necessary both to protect against unauthorized copying and to make it clear that a library may not upload a protected work

to local and wide area networks and make it available to multiple users at multiple sites.

We urge the Committee to consider clarifying language in the legislation to ensure that the library exemption is limited to its intended preservation purposes and that widespread dissemination of proprietary works does not result.

III. EXEMPTIONS FOR THE VISUALLY IMPAIRED

Novell recognizes the special needs of the blind and other persons with disabilities and supports the goal of improving their access to creative works via digital transmission. We support the efforts of the National Federation of the Blind, the Copyright Office and the Association of American Publishers, Inc. ("AAP") to design a proposal for meeting the needs of the disabled community that is administratively simple, targeted to needy beneficiaries, not likely to impair the growth of other publications for the disabled, and capable of ensuring that access to published works for the disabled is immediate.

We recommend that the amendment to this section proposed by the National Federation of the Blind, with the endorsement of the Copyright Office, the Library of Congress and the AAP, be adopted.

IV. COPYRIGHT PROTECTION AND COPYRIGHT MANAGEMENT INFORMATION SYSTEMS

Novell supports the provisions of S. 1284 regarding copyright protection and copyright management information systems and believes these are sensible and necessary responses to the problems of privacy on national and global networks.

As I noted at the outset, piracy of protected works is an enormous problem for our company and the computer software industry as a whole. As the case of David LaMacchia vividly demonstrated, our current laws provide inadequate protection against the new attitude among would-be infringers who violate the copyrights of others for sport.

By penalizing those who circumvent or defeat copyright protection and copyright management information systems, this legislation takes an important step toward ensuring that copyright owners are not forced to check their rights at the gateway when they enter the information superhighway.

A. Copyright protection systems

Novell believes the approach to copyright protection systems embodied in S. 1284 is both sensible and appropriate. Instead of mandating a specific technology which would soon become outmoded by virtue either of technological innovations or the ingenuity of would-be thieves, the legislation proposes a legal standard that is strong enough to deter violations, yet flexible enough to adapt to changes in technology.

In the rapidly developing world of cyberspace, it is not possible to forecast every possible situation that will arise. As I mentioned earlier, the techniques and devices used by pirates to circumvent copyright protection systems are increasingly sophisticated technologically. A prime example is the product which permits users to circumvent the serial numbering technology embedded in Novell products to help prevent copyright infringement. Prosecuting this case has been a challenge because the product in question is not a pirated product per se, but rather an instrument designed to permit pirating to occur. S. 1284 would ensure that the producers of such a product could be held liable.

The "primary purpose" test allows courts to use a variety of factors to determine on a case-by-case basis whether a particular product being manufactured, imported or distributed is really a circumvention device or whether circumvention is an incidental effect.[1] The test itself also provides an important safeguard against the inappropriate use of enforcement provisions by requiring that the primary purpose or effect of the device or product must be circumvention.

Novell believes that it is important to expand the coverage of this provision to prohibit not only the importation, manufacture and distribution of such devices and products, but also the use of such devices. Those who intentionally use circumvention systems to defeat copyright protection systems pose a threat just as much as those who make and sell such devices. Amending S. 1284 to expressly prohibit the use of such products or devices will help ensure that the market for these devices

[1] The courts have had little difficulty applying a similar standard in the Communications Act of 1934 which requires the court to determine whether a particular device or equipment is "primarily of assistance in the unauthorized decryption of satellite cable programming." 47 U.S.C. §605(e)(4). *See, e.g., United States* v. *Howard,* 13 F. 3d 1500, 1501 (11th Cir. 1994); *United States* v. *Davis,* 978 F2d 415 (8th Cir. 1992).

will dry up. Everyone that comes in contact with one of these products, from the manufacturer to the end user, should know they are dealing with illicit goods.

Novell is sensitive to the concern that imposing liability for the use of circumvention devices could result in students or novices inadvertently running afoul of the Copyright Act. However, we note that the legislation specifically authorizes courts to eliminate any award of damages in cases where the violation was innocent. The combination of the primary purpose test with the protection for innocent violations ensures that inadvertent infringers will not be subject to liability.

B. Copyright management information systems

Novell also supports the provisions of S. 1284 that address Copyright Management Information systems. We believe making it illegal to remove, alter or falsify copyright information is appropriate, and a far better solution to the concerns about piracy than requiring copyright owners to include specified copyright management information or mandating the use of specific technologies.

The removal and falsification of copyright management information encoded in digital works threatens the integrity of the entire copyright protection system, inhibits the licensing of works, and serves no purpose other than to frustrate the rights of copyright owners. It is important that such actions be prohibited.

V. SERVICE PROVIDER LIABILITY

Although the legislation does not address the issue of service provider liability directly, I would like to take a moment to comment on this important issue.

Online service providers ("OSPs") and Internet service providers ("ISPs") (collectively referred to as "OSPs") have sought amendments to S. 1284 that would reduce their exposure to infringement liability. We recognize that it is technologically difficult, as well as time-consuming, for OSPs to screen all of the information that comes across their systems for potential infringements.[2] Nor are OPSs necessarily capable of detecting infringements in any event. We therefore understand their concerns and desire for legal clarification.

On the other hand, OSPs cannot simply wash their hands of any responsibility for ensuring that copyright is respected on their Internet service. OSPs are often in the best position to detect copyright infringements. Indeed, to hold them responsible for infringements would be consistent with the legal treatment of other distributors of copyrighted works. Companies such as Barnes & Noble, Tower Records, Egghead Software and Blockbuster Video similarly cannot realistically be expected to review all the books, records, software, and videos they sell; yet each of these entities may be subject to liability if the copies or works it sells are infringing.

We understand that these difficult issues are being negotiated by representatives of OSPs, content providers and others. We endorse that process, because we believe that dialogue can lead to the understanding necessary to craft a legislative response to these problems.

But if a legislative compromise cannot be achieved, then the enactment of S. 1284 should not be delayed. The business of the OSPs has been growing briskly, and we do not see any of them going out of business because of copyright issues. Even though Novell is presently offering products that provide Internet access, we are not concerned about moving forward with this important legislation in the absence of a resolution of the OSP liability issue. We are confident that the liability standards in existing case law are sufficiently flexible and fair to achieve a reasoned and just result in any liability issues that may arise.

In any event, the OSP liability issue can always be dealt with later, if necessary, based on a more informed understanding of the relevant facts and the case law. We urge you not to delay the adoption of this important legislation.

VI. CONCLUSION

Mr. Chairman, the United States stands to lose a lot if copyright protection for digitized works is inadequate in cyberspace. The United States is the principal source of innovation in software worldwide, and the software industry is a rapidly growing sector of the U.S. economy. Between 1980 and 1992, the computing and software industry grew at an annual rate of over 28 percent. By comparison, the overall annual rate of growth in the United States was less than 3 percent. The software industry is now larger than all but five manufacturing industries in the United States. Together, computing, software and semiconductors account for over 1.2 million jobs. If the digital environment fails to offer adequate protections for the

[2] Such monitoring could also pose significant privacy concerns.

producers of proprietary works, these jobs are at risk. This legislation takes an important step toward ensuring the continued health of this vital U.S. industry.

I am pleased to offer Novell's support for this bill. Mr. Chairman, I commend you for your efforts on this legislation and thank you for inviting me to present Novell's views today. I will be happy to respond to any questions.

The CHAIRMAN. Well, thank you so much. This has been a very interesting hearing to me and each of you has contributed, I think, immensely to the hearing. Now, I think we all agree, or at least most everybody agrees that copyrighted material should be protected in cyberspace. The question is how you do it. How do you do it so it is fair and reasonable?

Let me just ask, some have suggested that we wait and see how the information superhighway develops before we legislate in this area, that we just put it off. In your opinions, is it appropriate that we act now, and do you agree that if we do so, that will, in fact, aid the development of the Internet because, as some have said, many copyright owners will not take the risks of making their material available online without more protection?

We will start with you, Mr. Kay.

Mr. KAY. Mr. Chairman, I think that the timing of the legislation is absolutely critical. A strong signal needs to be sent soon, and therefore we think that waiting on 1284 will really continue to have the type of chilled development of electronic commerce.

I would just simply use the analogy—I think this committee about 20 years ago had to deal with the issue of software development and whether a computer program was, in fact, protectable. The committee, in its judgment, sent a very early signal to the country that that was something that ought to be protected. As a result of the committee's judgment and the Congress' judgment, the software industry basically was born, in part, because of Congress sending an early signal.

I think here there are even more industries at stake than just the software industry that will benefit if electronic commerce flourishes. So I think it is very important that in the same way you did it 20 years ago that you look at this as an opportunity to really begin the process by sending that kind of signal to both the corporate world, but also to the online community.

The CHAIRMAN. Well, thank you. Does anybody have a contrary opinion of that? Mr. Oakley.

Mr. OAKLEY. Yes. Mr. Chairman, we think this is a very important issue, as I indicated in my opening remarks, but we also think that this is one of those issues where it is very important that we maintain the kind of traditional balance that we have always had in copyright law, and we think it is very important to make sure we get it right rather than acting quickly.

One of the things that we have been concerned about is the sort of portrayal that there are only two kinds of use here. There is either licensed use, use that is specifically authorized by an individual copyright owner, or there is pirated. It has got to be one or the other. But there is a middle ground and it is that middle ground that is somewhat at risk here.

That middle ground is the various exceptions and exemptions that have been provided for in the Copyright Act, such as fair use, the library exemption, distance education, those kinds of lawful uses that are not necessarily specifically authorized by individual

copyright owners but are certainly not piracy either. We think it is very important to make sure that all of those issues are considered and resolved as well, and it is more important to take an extra few months or a year and do it right rather than disturbing that balance.

The CHAIRMAN. Well, we are interested in that and we want to have your ideas on how we best do that because nobody wants to disturb—at least I don't want to disturb fair use rights or library rights or research rights or historian rights, and so forth. But I don't see why it is going to take an extra lengthy period of time to resolve it, even though it is complex and very difficult. So I would like all of you thinking about it because I am concerned about those rights and I would like to approach it in the very best way here and I do think we need to move ahead.

Mr. Burrington.

Mr. BURRINGTON. Just briefly, Mr. Chairman, I think it is very critical that we act now, provided we can resolve this liability question in an appropriate way in light of the realities of the medium and the various actors that are involved in the medium.

The fact of the matter is all the people behind me in this room and at this table are all in the same boat, or we will be soon. We are becoming a major new media entertainment studio, so we care a great deal about copyright. We are also an Internet access provider. We are also an online service provider. Our coalition consists of all of the phone companies and the long-distance carriers and online Internet service providers.

I think it is clear that there is a conversion going on here, and frankly content providers are chomping at the bit to get their content online. We haven't seen people who are afraid to do that because of this issue, but I think that we would very much like to have some clear rules of the game, a framework that makes sense from a global perspective. To the extent that we can do that through our continued negotiations, then we would urge that this legislative process go forward quickly.

The CHAIRMAN. Well, I am going to challenge you, Mr. Oakley, and others to help us do this. I don't think we should be putting this off. We set the world standards in these areas and we ought to do it with this bill. I have made the point that I don't have any pride of authorship on it. We have tried to follow the White Paper. I don't think it is perfect by any stretch of the imagination. I don't think the bill is, but I tell you one thing. I intend to move ahead, so it is going to be incumbent upon you to come up and help us to find the best language we can.

Now, let me ask you this, could encryption technology alone, without a copyright update, be sufficient to protect content owners, or is this the equivalent of not criminalizing burglary and having homeowners lock up their houses as best they can? Who would like to take that? Mr. Kay.

Mr. KAY. I think the suggestion has been made that simply if we are able to lock the material, that is good enough. If you look at some of the situations that we showed you earlier in our demonstration, if you control the content and you lock it, then you can protect it, and that will provide protection for people who hold the copyright. But what about the person who is in Finland who inap-

propriately put up the material? How does encryption solve that problem?

There is a creative artist. You have written this book. It is available online now in its full text. Encryption doesn't really solve that issue, and so in that set of circumstances where there is unauthorized use, you are going to still need ground rules that define what somebody has done when they have put up text without permission. I think, therefore, you need a combination of both encryption and copyright.

The CHAIRMAN. Let me say this online—Mr. Oakley.

Mr. OAKLEY. Why don't you finish?

The CHAIRMAN. On this online service provider liability, in your opinions, who is best able to root out and stop copyright infringements, the copyright owners who do not control the pipes through which the materials are sent or through which the infringement is going, or the online service owners who often, as you have pointed out in your presentation here, do not know whether a work is infringing or not, or is there some other solution?

Mr. BURRINGTON. I think, Mr. Chairman, if I may, on that it is a multi-pronged solution. Clearly, we as America Online or the other online service providers cannot possibly train a bunch of college students to surf the net all day long and be able to identify proactively every single piece of copyrighted work out there because literally all the content on the Internet could be conceivably or is copyrighted.

What we have tried to do—and I think we are doing this successfully in negotiations—is to focus on the shared responsibility to work together to develop technology tools both from the copyright owner's perspective and our perspective to help the copyright owner do their own searching.

Time-Warner, for example, clearly knows their copyrighted material better than any of us ever would. Likewise, however, if we become aware of something and we have actual knowledge of a copyrighted work that is being infringed or where we are given a clear and definitive notice, then we feel we have an obligation to act, as well. So it is sort of this shared responsibility both in terms of looking, so to speak, for copyrighted material and responding to it, and I can't emphasize enough the need, I think, for us collectively as a creative industry, as well as the online service industries, to focus on education here because we are dealing with a lot of younger computer users. Let's face it. I don't think there has been adequate education on copyright——

The CHAIRMAN. That still doesn't solve my problem of how do we write this so that we can resolve it. You are depending upon future developed technology. You are dependent upon cooperative techniques that we may or may not understand. I think you are going to have to help us here.

Mr. BURRINGTON. In my answer, actually, Mr. Chairman, was the concept, though, that if we set up a legal framework where we as online service providers are given notice of an infringement and we are required to take that material down and we have a definitive, definite kind of a notice, and that is a mandatory situation, we actually think that that will work very effectively. Likewise, we

need to educate our employees and our users about copyright infringement and rights and responsibilities.

But the fact is, Mr. Chairman, the pipeline that you talked about contains a bunch of zeroes and ones, so for a lot of people in this chain, like pure Internet access providers or backbone providers, they don't know what is inside those pipelines and they will never know.

The CHAIRMAN. As you brought it out here, this is a worldwide—you know, the piracy of American intellectual property is a mammoth, worldwide problem. How would our legislation affect international antipiracy efforts? We can go back to the prior one, if you like, as well, but I am concerned about some of these things. Then I want to go to Senator Specter. I have got a lot of other questions, but I will move to Senator Specter after this.

Yes, Mr. Kay.

Mr. KAY. If I could just address the OSP liability issue for one moment and respond, I want to suggest that if we look at four or five aspects of it, it might be helpful directly to you.

First of all, I want to echo Bill Burrington's comments. The creative community and the online service provider community, I think, have done an outstanding job of educating each other. While we don't have a concrete solution yet to present, there have been hundreds of hours of negotiations that we actually initiated in the conversation with the ISA last summer. Those are continuing and I think they ought to continue.

The areas of agreement, I think, in general, are fourfold. One, there is an agreement, I think, that copyright holders have a major responsibility themselves to look out for this material, and I think in each site we showed you we do have either trade associations or companies trying to do that. So I think there is agreement that that is fundamentally an initial responsibility of copyright holders.

Second, there is an agreement that where the OSP's are directly infringing, they ought to be held liable for that conduct. Third, I think conceptually we have agreement that we want to head toward some kind of a notice and take-down provision, although there is real disagreement about how to write it. The notion that if we give them notice and they try to take it down quickly that there ought to be some limited liability for them in that kind of a situation—I think conceptually we have agreement there.

Fourth, we, in general, have agreement on the notion that where you are acting truly as a conduit in which you are basically providing a T–1 trunk line and you are not involved in the conduct, there ought to be limited liability. The area where I think the issue is really breaking down is this area over vicarious and indirect liability on the issue of when the OSP's do exercise control.

I won't take your time showing you some additional slides, but if you go into one of these OSP services, they direct you to content. My 14-year-old goes to the hot sites on the Internet and he is directed there and suggested as to where he ought to go. The current OSP position, in general, is that they shouldn't have responsibility for directing people to infringing sites until we call them. Here is an example where they have employees who are making determinations about what sites are hot on the Internet without a judgment as to whether those may be infringing sites. That is an area

where we don't really have conceptual agreement, and we think that it would be a real mistake for the committee to cut back liability in those areas because we think the incentive for those companies to set up the way they direct people onto the Internet—the incentive to do it in a responsible way would be removed.

Senator SPECTER. Mr. Chairman, if I might just make a brief comment?

The CHAIRMAN. Sure.

Senator SPECTER. First, I want to commend you, Senator Hatch, for holding this hearing. The workload of the Judiciary Committee is sort of astounding this year, and this is obviously a very important hearing and it comes on a day when we are very, very busy. I have just come from a meeting on the breast cancer issue in connection with my duties as chairman of the appropriations subcommittee. I have a large group waiting upstairs, rural electrification, but I wanted to come by and express my concern and my interest on this issue of the National Information Infrastructure Copyright Protection Act.

We have so many items to address with the advance in technology on the Internet and the issue of digital transmission with a great many competing interests here on protection of property rights and trying to define what liability there will be on the carriers, and we are struggling with it. I can say, notwithstanding the paucity of members who are in attendance here that the committee feels very, very keenly about it and we will pay close attention to it.

Again, I commend you, Mr. Chairman, the chairman of the powerful Judiciary Committee, as a consequence, being the sole survivor in attending so many of these hearings, a responsibility I share on the appropriations subcommittee or on the Intelligence Committee. Usually, it is a one-man show, but we will be paying close attention to this very important item.

Thank you.

The CHAIRMAN. Well, thank you, Senator Specter, and we appreciate the interest that you show on these issues. It is very important to me personally and to the committee at large, and I think to the folks out there in the audience. So I know how busy you are and we appreciate your coming.

Mr. Burton.

Mr. BURTON. Mr. Chairman, if I could make, I think, a broader statement that I think ties in the OSP question to some of the encryption questions that you asked earlier, I think we face——

The CHAIRMAN. By the way, before we go any farther, let me just say that we are going to keep the record open until the end of the week for any Senator on the committee because we have got five of them over on the floor right now handling it for me because I am supposedly managing the floor bill right now, and a number of others in various committees doing their jobs. But we will keep the record open for any written questions to the witnesses until the end of this week, and we would ask you as witnesses to respond no later than May 24 because we are going to move ahead with this. We want some answers and we want to do the best job for all of you that we can.

We don't have any desire to hurt any of you. We have a desire to get this done right, but it is important that we move ahead and if we have to fine tune it in the future, we will fine tune it in the future. I think there is a goodwill here to try and do what is right in all of these areas, and so just help us because you are the experts and we are trying to learn from you.

Mr. Burton, sorry to interrupt you like that.

Mr. BURTON. That is quite all right. Again, we appreciate your taking time away from other activities to be here.

I think if you look at what is happening in this marketplace, it is one that is exploding. It is one in which the technology is changing daily. Our conception of what an OSP was 6 months ago was different, and our conception of the services being provided, and I think there are going to be several issues where we have to have shared responsibility and work together to resolve them.

However, it is our strong feeling that the balance which has been struck in this legislation, which focuses on some core issues which protect the rights of users, of providers, which strengthens the competitiveness of U.S. content owners, is a good balance and we think that this bill should be put through the process and not held hostage to side discussions.

The CHAIRMAN. Thank you. Mr. Oakley, and then we will come to Mr. Bettis. We will let you wind it up, Mr. Bettis.

Mr. OAKLEY. Thank you, Mr. Chairman. I just wanted to comment on a couple of the points you have made along the way. First off, the Digital Future Coalition is pleased to respond to your challenge to help you work on language. For each of the points that have concerned us, we have, in fact, submitted specific language that we invite a conversation with you about as to whether or not that doesn't help to maintain the balance. So we accept that challenge and we are very happy to work with you on that point.

With regard to the issue of online service provider liability, you asked who should be responsible. I think in the first instance the reaction is the person that should be responsible is the person who is culpable, the person who made that information available on the Internet in the first place.

With regard to the sort of role of providers in that, it sometimes is a question of attenuation. How far down that road of pointers to sites should there be liability? Our group is very concerned about that issue as well, so we have been active participants in the discussions that have been going on, on the House side with regard to online service provider liability and hope that there will be a good compromise come out of that.

The CHAIRMAN. OK, thank you. Let's go to Mr. Bettis and then I will wind up with you, Mr. Burrington.

Mr. BETTIS. Thank you, Senator. I am a bit overwhelmed. I am just a songwriter. I am a songwriter that loves Utah, but I am a songwriter. [Laughter.]

The discussions about liability are taking place. To be honest with you, they are legal and they are probably way over my head. All the songwriters that I am here representing, all the individual, tiny small businesses, hope they are done in good faith. There is an answer available to us right now for the liability question.

ASCAP offers a license for the online services and we already have dozens of takers, and this isn't completely frivolous.

I was watching the first presentation and the sound bite that was used was "One Sweet Day," and I know that song really well. I was there when that song was born. I was there when that record was made, and I go back 6 or 7 years with Walter Afanasieff, one of the writers on that song. I remember when Walter was struggling very hard in 1990 and he didn't have hardly any money. He had lost his marriage and he had one career that he had kind of thrown away. He was putting his life back together and I was there with him writing songs. Bless his heart, he has done a good job and he has got a beautiful wife and three children, and that is right now, right today, and they eat and they sleep and they need a house and he makes his living from the songs he writes.

Every day this goes on, there is more and more money that is not available for the family of the creator of that song and all the other creators of that song, and I am here probably slightly unqualified, but I represent an enormous amount of me and we are the smallest small business there is. It is a single combat warrior life I lead. Every day when I leave here, I will go to a room full of musical instruments, ashtrays and discarded pieces of paper with bad ideas on them, and quite a few computers. Every day, nobody pays us to do it. We sit in a room and we try to come up with something that someone else will think has value, and that is how come they want it. Please help us protect it. Please take a license now. We have kids.

The CHAIRMAN. Well, that is very poignant and I appreciate it. I think I probably understand it better than most people. By the way, you can't believe what the clean air in Park City, UT, would do for music writing. [Laughter.]

I challenge you to try it. I think you will find that ideas and inspiration come just almost——

Mr. BETTIS. Thank you very much. Do you know the flight schedule at all?

The CHAIRMAN. As a matter of fact, I do.

Mr. BETTIS. I bet you do. [Laughter.]

The CHAIRMAN. Mr. Burrington.

Mr. BURRINGTON. Very briefly, Mr. Chairman, again thank you for giving our coalition a chance to be here. I think you summed it up well. We need to make this medium truly global, to make it a main-street medium so that individual writers and authors and creators can sell their ideas. We need to get this issue resolved. It is that simple, and I want to leave you with the thought that if we, the online service providers and Internet access providers, become the so-called deep pocket, as Commissioner Bruce Lehman said yesterday on a panel that I was on with him, it will take about three lawsuits before the next stop will be in bankruptcy court.

I think we have to find the proper balance here. In fact, if we are the deep pocket, I think we create a situation that exactly is the situation that you fear, Mr. Bettis, which is that we create sort of this perverse disincentive to do anything about the issue. If users think, well, gee, I am scott-free because America Online will pay for my infringement or piracy, that sends the wrong message. Likewise, I think if we are the deep pocket, the copyright commu-

nity itself won't have the incentive to really be a partner with us to go out there and to address this important issue globally.

So, again, thank you, and we look forward to working and we are committed to working on this particular provision.

The CHAIRMAN. Well, help us to do it because there is going to be online provider liability. There is just no question about that.

Mr. BURRINGTON. It is either here or in a courtroom.

The CHAIRMAN. Yes; the question is how do we do it in the fairest and best way, and you have got to help us to know how to do that.

Mr. BURRINGTON. Thank you.

The CHAIRMAN. I want to just end with Mr. Kay on that question on international piracy that I asked earlier, which was I cited the tremendous worldwide problem of international piracy and whether or not the legislation as we have written it will help us to solve that problem.

Mr. KAY. Mr. Chairman, we believe it does. One of the reasons we used two of the sites that we showed you at the outset today is they were located in Denmark and Finland.

The CHAIRMAN. Right.

Mr. KAY. I think the reach of this issue is critical. To go to your issue of why timing is so important, the sooner that the Congress can make its judgment and state a position, the sooner that U.S. industry and U.S. policy can have a foothold in this environment. So we believe very strongly that the bill as it is written will have a major salutary global impact, but it also suggests to us that very timely and immediate action on the bill is appropriate.

The CHAIRMAN. Well, let me just say this. I have to get to the floor, but this has been an immensely important hearing. Your statements have all been excellent, as far as I am concerned. I think we have got the issues out there. There are others, I know, but the major issues are out there. Your concerns have been expressed. Like I say, I want to do the best legislative job we can, with the further commitment that even if we have missed something in the legislation and we find there is need for fine-tuning, we will get that done for you. I think we can because I think people do rely pretty impressively upon what the Judiciary Committee does in this area because it tries to do it in a nonpartisan, bipartisan way that benefits everybody concerned.

So I am going to submit the rest of my questions in writing. We will keep the record open for other members of this committee and their questions by the end of this week. We would like your answers back by the 24th.

We are going to try and move ahead, and I hope we can bring everybody together in doing so. Let us remember, although every aspect may not be perfect and the way you want it, we need to start somewhere. I think we ought to try it and then fine-tune it because this isn't one of those areas where you get into the intellectual quagmire of competitive party politics. I think this is something where both parties and everybody in the Judiciary Committee and everybody in the Senate and House really have to be concerned.

We want to be the worldwide leaders in this area. We are the worldwide leaders and we want to maintain that, and the thing

that keeps us in the game from an intellectual standpoint, from a creative standpoint, and from a creation of products standpoint across the board happens to be our patents, copyright and trademark approaches. Now, the rest of the world is starting to pay attention to them and starting to listen to us and we want to keep setting those standards.

So I think you have all contributed greatly here today and I want to personally thank you for it. We will, like I say, keep the record open and we will look forward to hearing from you in the intervening weeks to see what we can do to correct and reform the legislation and do really what is in the best interest of everybody. Thanks so much. Thanks for being here.

With that, we will adjourn until further notice.

[Whereupon, at 11:34 a.m., the committee was adjourned.]

APPENDIX

PROPOSED LEGISLATION II

104TH CONGRESS
1ST SESSION

S. 1284

To amend title 17 to adapt the copyright law to the digital, networked environment of the National Information Infrastructure, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 28 (legislative day, SEPTEMBER 25), 1995

Mr. HATCH (for himself and Mr. LEAHY) introduced the following bill; which was read twice and referred to the Committee on Judiciary

A BILL

To amend title 17 to adapt the copyright law to the digital, networked environment of the National Information Infrastructure, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "NII Copyright Protection Act of 1995".

SEC. 2. TRANSMISSION OF COPIES.

(a) DISTRIBUTION.—Section 106(3) of title 17, United States Code, is amended by striking "or by rental,

lease, or lending" and inserting "by rental, lease, or lending, or by transmission".

(b) DEFINITIONS.—Section 101 of title 17, United States Code, is amended—

(1) in the definition of "publication" by striking "or by rental, lease, or lending" in the first sentence and insert "by rental, lease, or lending, or by transmission"; and

(2) in the definition of "transmit" by inserting at the end thereof the following: "To 'transmit' a reproduction is to distribute it by any device or process whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent.".

(c) IMPORTATION.—Section 602 of title 17, United States Code, is amended by inserting "whether by carriage of tangible goods or by transmission," after "importation into the United States,".

SEC. 3. EXEMPTIONS FOR LIBRARIES AND THE VISUALLY IMPAIRED.

(a) LIBRARIES.—Section 108 of title 17, United States Code, is amended—

(1) in subsection (a) by deleting "one copy or phonorecord" and inserting in lieu thereof "three copies or phonorecords";

(2) in subsection (a) by deleting "such copy or phonorecord" and inserting in lieu thereof "no more than one of such copies or phonorecords";

(3) by inserting at the end of subsection (a)(3) "if such notice appears on the copy or phonorecord that is reproduced under the provisions of this section";

(4) in subsection (b) by inserting "or digital" after "facsimile" and by inserting "in facsimile form" before "for deposit for research use"; and

(5) in subsection (c) by inserting "or digital" after "facsimile".

(b) VISUALLY IMPAIRED.—Title 17, United States Code, is amended by adding the following new section:

"§ 108A. Limitations on exclusive rights: Reproduction for the Visually Impaired

"Notwithstanding the provision of section 106, it is not an infringement of copyright for a non-profit organization to reproduce and distribute to the visually impaired, at cost, a Braille, large type, audio or other edition of a previously published literary work in a form intended to be perceived by the visually impaired, provided that, during a period of at least one year after the first publication of a standard edition of such work in the United States, the owner of the exclusive right to distribute such work

in the United States has not entered the market for editions intended to be perceived by the visually impaired.".

SEC. 4. COPYRIGHT PROTECTION SYSTEMS AND COPYRIGHT MANAGEMENT INFORMATION.

Title 17, United States Code, is amended by adding the following new chapter:

"CHAPTER 12.—COPYRIGHT PROTECTION AND MANAGEMENT SYSTEMS

"Sec.
"1201. Circumvention of copyright protection systems.
"1202. Integrity of copyright management information.
"1203. Civil remedies.
"1204. Criminal offenses and penalties.

"§ 1201. Circumvention of copyright protection systems

"No person shall import, manufacture or distribute any device, product, or component incorporated into a device or product, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without the authority of the copyright owner or the law, any process, treatment, mechanism or system which prevents or inhibits the violation of any of the exclusive rights of the copyright owner under section 106.

"§ 1202. Integrity of copyright management information

"(a) FALSE COPYRIGHT MANAGEMENT INFORMATION.—No person shall knowingly provide copyright management information that is false, or knowingly publicly

distribute or import for public distribution copyright management information that is false.

"(b) REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION.—No person shall, without authority of the copyright owner or the law, (i) knowingly remove or alter any copyright management information, (ii) knowingly distribute or import for distribution copyright management information that has been altered without authority of the copyright owner or the law, or (iii) knowingly distribute or import for distribution copies or phonorecords from which copyright management information has been removed without authority of the copyright owner or the law.

"(c) DEFINITION.—As used in this chapter, "copyright management information" means the name and other identifying information of the author of a work, the name and other identifying information of the copyright owner, terms and conditions for uses of the work, and such other information as the Register of Copyrights may prescribe by regulation.

"§ 1203. Civil remedies

"(a) CIVIL ACTIONS.—Any person injured by a violation of Sec. 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation.

"(b) POWERS OF THE COURT.—In an action brought under subsection (a), the court—

"(1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation;

"(2) at any time while an action is pending, may order the impounding, on such terms as it deems reasonable, of any device or product that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation;

"(3) may award damages under subsection (c);

"(4) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof;

"(5) in its discretion may award reasonable attorney's fees to the prevailing party; and

"(6) may, as part of a final judgment or decree finding a violation, order the remedial modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator or has been impounded under subsection (2).

"(c) AWARD OF DAMAGES.—

"(1) IN GENERAL.—Except as otherwise provided in this chapter, a violator is liable for either (i) the actual damages and any additional profits of the violator, as provided by subsection (2) or (ii) statutory damages, as provided by subsection (3).

"(2) ACTUAL DAMAGES.—The court shall award to the complaining party the actual damages suffered by him or her as a result of the violation, and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages, if the complaining party elects such damages at any time before final judgment is entered.

"(3) STATUTORY DAMAGES.—

"(A) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1201 in the sum of not less than $200 or more than $2,500 per device, product, offer or performance of service, as the court considers just.

"(B) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each

violation of section 1202 in the sum of not less than $2,500 or more than $25,000.

"(4) REPEATED VIOLATIONS.—In any case in which the injured party sustains the burden of proving, and the court finds, that a person has violated section 1201 or 1202 within three years after a final judgment was entered against that person for another such violation, the court may increase the award of damages up to triple the amount that would otherwise be awarded, as the court considers just.

"(5) INNOCENT VIOLATIONS.—The court in its discretion may reduce or remit altogether the total award of damages in any case in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation.

"§ 1204. Criminal offenses and penalties

"Any person who violates section 1202 with intent to defraud shall be fined not more than $500,000 or imprisoned for not more than 5 years, or both.".

SEC. 5. CONFORMING AMENDMENTS.

(a) TABLE OF SECTIONS.—The table of sections for chapter 1 of title 17, United States Code, is amended by

inserting after the item relating to section 108 the following:

"108A. Limitations on exclusive rights: Reproduction for the Visually Impaired."

(b) TABLE OF CHAPTERS.—The table of chapters for title 17, United States Code, is amended by adding at the end the following:

"12. Copyright Protection and Management Systems ..... 1201".

SEC. 6. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of the enactment of this Act.

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Additional Submissions for the Record

Prepared Statement of Alex Alben

WHAT IS AN ONLINE SERVICE? (IN THE EYES OF THE LAW)

Introduction—The blind men's parable

American judges have approached online services in much the same way that a group of blind men approach an elephant. According to the parable, one blind man feels the elephant's trunk and pronounces that he has found a snake, a second feels a leg and declares he is standing next to a tree, a third feels the elephant's ear and opines that he is touching the wing of a large bird. From limited observation, each man deduces an erroneous conclusion.

The danger of deducing the quality of the whole from experience with one part has been dramatically illustrated in recent cases dealing with online services involving Prodigy,[1] Compuserve[2] and the Internet.

In turn, judges have concluded that online services should be treated as publishers, bulletin boards, common carriers, or the "letters to the editor section" of a newspaper. Are all of these decisions wrongly decided? Is there a single correct way to analyze the legal dimensions of an online service? Does a collective lack of familiarity with the online world play into these decisions?

This article attempts to explain why it is so difficult to place "online services" within the various legal models developed in the realms of traditional media. Not surprisingly, it concludes that online services are hybrid beasts, combining elements of communications enterprises as various as newspapers and telephone companies.

The old models don't fit the new electronic world. Even where aspects of old models apply in part, online services present a moving target for those attempting to place them within legal frameworks. [For those who wish some clarity with respect to definitions of technical elements of the electronic online world, a Glossary appears at the end of this article.]

We also must ask whether "interactivity" itself adds a new legal dimension to online services that changes the legal paradigms applicable to traditional media. For example, the legal liability of a book publisher stems from the fact that book publishers, working with authors whom they select, control 100% of the editorial content of a book title, whereas an online publisher may only "publish" 75% of the content that resides on its electronic service, and this rate will not only vary from day to day but with the choices made by each individual user. Not surprisingly, many of the legal issues arising for online publishers are sparked by the 25% of content from unsolicited and often anonymous sources.

Because British and American case law evolved in a world of existing "traditional" media, it's essential to understand that an online service is a hybrid that combines different communications systems. A newspaper, for instance, is not also a Yellow Pages. A cable television system is not also an electronic meeting place where people freely exchange views, although the Public Access function of a cable system approaches such a forum. A radio station is not also a repository of musical data that users search according to their interests. A phone system is not also a kiosk where people freely post messages. But an online service may be all of these things at once.

Online services face liability under many legal doctrines, but the speed of electronic communication and ability to make perfect digital copies of content make them particularly susceptible in the areas of copyright infringement, violation of privacy rights, the presentation of "obscene" or "indecent"[3] material, and defamation.

Given the unique quality of online services, it's useful as a starting point to analyze how online services resemble and differ from existing media models:

The publisher model

Many sites on the Web are one-dimensional sites that best fit a "publisher" model. These web sites (sometimes called "home pages" if they are home grown by an individual, as opposed to a corporate site) closely resemble self-publishers of books. Web sites not only display a wide variety of creativity, but also a range of technical sophistication. One web site chronicles the complete work of the Monty Python comic troupe. Hundreds showcase their favorite pets, authors, artists and celebrities.

On the wackier side, there's a Fidel Castro For President home page, a site that makes anagrams from a visitor's name, and a Cal Tech site that rotates a human cadaver. Another site captures a "freeze frame" of a view of the owner's hot tub. For lovers of popular culture, home-made web sites chronicle every line of dialogue

in The Simpsons television show, the Dilbert Zone, and a site for Hollywood Archaeology. Popular Search Engines such as Lycos, Netscape and Yahoo allow people to find sites devoted to special interests by searching for key words. By virtue of its architecture and search functionality, the Web encourages diversity of content and self expression.

Quite literally, anyone can become a publisher on the Web. As the New York Times recently observed, "Anyone with a modem is potentially a global pamphleteer."[4] Online services are constructed in ways that mimic the creation of traditional media. Many online services compile original articles, photos and artwork in ways that are editorially identical to magazine and newspaper lay-outs. But unlike a magazine, the articles and pictures comprising one issue may be stored in a data base that can be searched online by users. Elements of an online service such as sports scores or weather information may be automatically updated from a news source such as a wire service. Other elements such as chat rooms are built and then left open-ended, to evolve as users add messages and dictate the flow of conversation. Bulletin boards, polls or letters to the editor allow users to post messages without the online service acting as a filter.[5]

Publication implies the acts of "selection" and "review" of editorial material. With respect to chat rooms and bulletin boards, online services don't select the material that users choose to post. Neither do online services regularly review messages from users. Sysops for chat rooms attempt to guide discussions to certain topics, but they can only invite comments and react to messages. Filters are applied to messages to screen foul language in advance of the display of the text,[6] but sysops don't review messages before they appear. They can only react to messages posted with warnings or suspensions from the room.

Furthermore, unless advertised to the contrary, online services don't monitor messages in real time, but only on a periodic basis. And even if a sysop reviewed messages in real time (at a tremendous cost given the 24 hour and global dimensions of chat rooms), sysops don't have the tools to "censor" abusers unless they know the abusers' e-mail addresses. In most chat rooms, where users participate on an anonymous basis and don't register their individual e-mail addresses, the sysop is only able to trace an IP address. to cancel the chat privileges for an abuser under this scenario, the sysop may be forced to shut down access from an entire network, say Microsoft, simply to punish a single offender.

The motive guiding monitoring of chat and bulletin boards is to prevent harassing behavior and to maintain language appropriate to the discussion. Ironically, in an effort to keep chat clean, an online service may attempt to influence the flow of a discussion in a chat room, thus behaving more like a publisher. Judges have seized on this monitoring behavior to find grounds for liability in the area of defamation.[7] To avoid such liability, online services would be advised to monitor less frequently or even to drop all efforts to monitor messages. This would not only fail to address the control of online libels, but would have the perverse result of encouraging dirty language and harassing behavior in unsupervised chat rooms and bulletin boards, and might expose online services to liability for providing a means of access to indecent material (however such material is defined).

The other problem with holding online services liable for "publishing" defamatory statements is that the service providers lack the factual context for determining whether a posted message is defamatory. The statement that "John Smith has three sons" is not libelous on its face. Knowing that John Smith has never been married to anyone except Mary Smith (who has no children) could make the statement libelous in context. Where a magazine or television producer might have the opportunity to explore this context in advance of publication by asking questions of the Smiths and their friends, an online service has no means to anticipate the subject matter of posted messages. Even with 24 hour monitoring, an online service lacks the tools to solve the "context problem."

And what traditional media analogy exists for a user who posts a "link" from an online service to a document residing somewhere on another server on the Web? Occasionally, links created by users invite other users to voluntarily access unseemly, even obscene, material. The absurd scenario of enabling a reader of the print version of the The New Yorker to automatically access content from the print version of Playboy, is a common occurrence on the Internet, and an example "connectivity" that makes electronic communication such a powerful research tool.

All of this illustrates that online publishers don't "publish," at least not in the traditional sense of the word, every content element that appears on their service. As a consequence, a sensible legal standard may deem online services to be "publishers" only with respect to original content they select and display for publication, and apply other models to the different features they contain.

What are these other models?

The dance hall model

If online services only fit the publisher model with respect to narrow slices of original content, perhaps they should be regarded as places that knowingly authorize and benefit from the exhibition of certain content. This has particular application to the question of vicarious liability for the posting of messages online.

A dance hall suggests an environment where the owner provides a stage for musical acts to play before an audience, yet where the owner does not control the content of the musical performances. To the extent that online services provide electronic stages for users to chat or post messages, does the comparison to a dance hall hold true?

Since the Jazz Era, copyright cases have held dance halls responsible for the unauthorized public performance of musical works by stage acts that they hired, despite the fact that the hall owner had no advance knowledge of what would be performed and, in some cases, the owners had advised the performers that they had to obtain permission from the owners of musical works they wished to perform.[8] The theory behind these cases is that the dance hall owner is an economic beneficiary of the music performed. It makes no difference whether the musical act is employed by the dance hall or is an independent contractor.[9]

Under a "vicarious liability" theory of copyright infringement, the dance hall owners were found to have a direct financial interest in the unauthorized exploitation of copyrighted works, even where they lacked actual knowledge that the performances were unauthorized.

While it is true that online services, particularly commercial services that market "chat" as a feature to prospective users, derive some benefit from chat rooms, online services don't benefit from the posting of private messages in the same way that a dance hall owner benefits from the ambiance created by the performance of music. Further, the "supervision" of the activities of the users in a chat room is much less direct than a dance hall proprietor who invites music groups to his stage with some awareness that they are a jazz, blues or rock band. In this sense, from a perspective of knowledge of infringing activity, an online service may be closer to a landlord who leases a premises and doesn't necessarily know how the tenant plans to use it.[10]

As noted above, for economic and editorial reasons, online services monitor only a fraction of messages posted to a chat room or bulletin board. Finally, a chat room may only exist as a minor adjunct to a service comprised of original editorial content, whereas the musical group occupies front and center stage of a dance hall. For online services, the "control" and "economic benefits" are much less direct or absent altogether.

The library-bookstore model

One could accurately describe America OnLine as a giant electronic magazine reading room. The service features electronic versions of magazines ranging from Road & Track, Consumer Electronics, to Redbook, and newspapers such as The New York Times and The Washington Post. Most libraries contain copy machines which allow visitors to photocopy selected articles from periodicals. This compares closely to the act of an online user selecting text from a web site and downloading the text to her hard drive or printing the data directly from her computer screen.

By federal statute, libraries are exempt from liability for the unsupervised use of photocopy equipment located within their buildings, provided that a warning against unauthorized copying is displayed at the photocopying machines.[11]

While the provision of equipment that facilities infringement may be ground for legal liability, the courts have reached disparate conclusions with respect to specific technologies. While contributory infringement was found for operators of equipment for phonorecord copying,[12] the Supreme Court found no liability for the category of video cassette machines, because VCR's are "merely capable of substantial non-infringing uses * * *" in the landmark Sony Betamax case.[13] Arguably, many users of VCR's occasionally use the equipment to time-shift programs for viewing at later date. However, survey evidence introduced at the rehearing of the Betamax case strongly suggested that most consumers primarily used VCR's to make permanent copies of copyrighted television programs and movies. Very few of these users have been known to call the applicable TV or film producer to ask permission to make such copies, yet no liability attaches to this activity.

Disturbingly, the mere act of advertising a video game cartridge copier online has been found infringing.[14] Yet in the case of a computer program designed to defeat anticopying protection, a court found no contributory infringement because the program also enabled users to make legal archival copies, leading the court to conclude that this was a substantial non-infringing use.[15]

Shouldn't courts consider the makers of software programs and PC hardware to be the "equipment providers" in these cases? An online service physically displays

a copyrighted work, but provides neither the software nor hardware for copying. Yet, a double-standard seems to be emerging for online services in this realm.

The core issue here is private copying. As manifested in *Betamax,* courts are loathe to find private home users guilty of infringement. Yet in the world of online electronic services, private home users have the ability to duplicate virtually any work they can access. Courts should view electronic sites as the equivalent of bookstores and libraries, where no infringing activity on the part of the web site is found for the unsupervised acts of individuals. The mere physical difference of navigating a library from a modern-linked computer versus the act of walking into a building should not change the legal outcome.

Courts should properly place the responsibility for online copying (as well as libel and obscenity) on the shoulders of individual users. Certainly, the primary function of online news and entertainment services is non-infringing. No judge would dare suggest liability for the Los Angeles Times for delivering newspapers to private homes that may contain photocopy machines. The result of deeming online services to be contributory infringers for the totally unsupervised actions of computer users is equally absurd.

Shifting the burden of liability to private users would require a different view of "Fair Use." To those who object that enforcing a ban on private copying as unrealistic, two trends must be noted: First, copyright owners will increasingly use technology to "copy protect" documents circulated online, either through self-destruct time-bombs or copy bugs. Second, where private copying is widespread and economically damages a copyright holder, as in the case of record and video piracy, the copyright owner will find it worthwhile to find and prosecute the offender. Private bounty hunting schemes to encourage self-policing of the Internet may also come into being.[16]

Alternatively, a better model for triers of fact may be to view an online service as a globe-spanning bookstore. After all, many people browse the offerings at bookstores without making specific purchases and few bookstores contain copy machines for public use. In one 1995 case, a right of publicity action brought by Howard Stern, a lower New York court held that an online service was analogous to a news vendor or bookstore and found no violation of Stern's right of publicity by a posting of a photo of Stern on a Delphi bulletin board.[17]

Yet even the bookstore model has its flaws. Few people pay "connect time" or a subscription to enter a bookstore and because few bookstores are sites for the exchange of messages, the comparison to an online service is far from exact.

The printing press versus the common carrier model

Electronic bulletin boards, also known as "BBS" systems, have borne the brunt of judicial wrath in the first wave of copyright cases involving the Internet. A BBS owner operates a computer that allows subscribers to post messages to a Bulletin Board. Most BBS operators are not themselves Internet access providers, but lease connections to the Internet from facilities such as Netcom On-Line Communications or AT&T. To the extent that a given BBS is an attractive message board for those who wish to post documents and those who wish to browse its documents, it will attract subscribers and revenue. BBS operators do not realize revenue when a non-subscriber accesses the BBS to look at a document.

To place a BBS into a First Amendment framework, a BBS resembles a commercial printer that automatically posts its printed materials to a kiosk in a heavily traveled place, perhaps a mall or college campus.

In two of the first cases finding copyright liability for use of the Internet, judges found BBS operators liable for publicly distributing and displaying copyrighted works.[18] and for soliciting subscribers to upload files containing copyrighted materials to a BBS that were available for Internet browsers to download.[19] In the first case, a subscriber posted digitized Playboy photographs to a BBS, making them available to other subscribers to the BBS to download. The court did not consider the issue of whether the BBS operator participated in the act of copying, but held that a BBS operator may be directly liable for displaying copyrighted works to the public without the permission of the magazine. Direct infringement was found, even though it was not clear that the defendants knew that the contents of the posted documents were nude pictures of Playmates.

In the second case finding infringement, a BBS operator solicited subscribers to upload documents containing Sega's popular video game software programs. For each download, the BBS operator received a fee. Direct and contributory infringement was found. The defendant here actively encouraged the infringing activities and provided facilities for copying.[20]

Yet suppose the Playboy or Sega bulletin board systems leased space within services such as Prodigy or Pathfinder? Would these services, Prodigy on its own system

and Pathfinder on the Web, be held liable as direct or contributory infringers? What liability if any should result for the Internet access provider who maintains the computers and phone connections that enable the BBS to exist?

These questions were explored in detail in *Religious Technology Center* v. *Netcom On-Line Communications Services, Inc.*, decided November 21, 1995.[21] In a potential landmark case for online services, Judge Ronald Whyte of the federal district court for the Northern District of California ruled that an Internet service provider and a client bulletin board system may be liable for contributory infringement of copyrighted works that are posted to a Usenet newsgroup.

The case is extremely significant for online services, because for the first time a knowledgeable judge examined the specific facts of a situation involving the distribution and copying of copyrighted works on computer networks linked to the Internet and wrote a well-reasoned opinion to support his conclusions. Even though this case involved an Internet service provider, Judge Whyte's analysis will undoubtedly be applied by other judges to independent online publishers such as Starwave and Hot Wired and to commercial online services such as Prodigy and AOL.

Having established that Netcom's alleged failure to remove copyrighted material from an independently operated BBS presents a triable issue as to Netcom's knowledge of the unauthorized posting, this case paves the way for future law suits against any link in the chain of posting copyrighted material on the Internet or on private online services.

The key holding in *Netcom* is that the Internet provider might be liable for "contributory copyright infringement." In this case, agents of the Church of Scientology (which pioneers many free speech and copyright cases) were successful in not only pinning potential liability to the person who posted the messages and the BBS operator, but also to the Internet access provider.

How does this case potentially affect online publishers? When users of original content services post messages to chat rooms or other fora, these messages might contain copyrighted material such as articles, photos or even audiovisual works. Because few services have the capacity to screen these postings in real time, they have no way of knowing what is about to pop up on their service. Likening Netcom's Internet access service to a functional copying machine, the court held that "Netcom's act of designing or implementing a system that automatically and uniformly creates temporary copies of all data sent through it is not unlike that of the owner of a copying machine who lets the public make copies with it."[22]

Further, the court took pains to dismiss Netcom's argument that it acted essentially as a common carrier. It observed that "Internet providers are not natural monopolies that are bound to carry all the traffic that one wishes to pass through them, as with the usual common carrier."[23] And, citing *Nimmer on Copyright*[24], Judge Whyte appears to conclude that an essential element of a common carrier is that it "must not have any direct or indirect control over the content or selection of the primary transmission."

In making his decisions turn on an "actual knowledge" standard, the court also noted that "Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party."[25] Does liability based on "knowledge" represent a step forward for online publishers and service providers?

Given the fact that many online publishers also run chat rooms and message boards, a holding that contributory infringement hinges on notice that copyrighted material may have appeared on their service without permission is not particularly liberating. Online services have a primary motive to screen content posted by users to stymie those who use foul language or seek to harass other users. Online services that also publish original material have editors who review the original content and users' responses to that content in chat, e-mail "letters to the editor" or question and answer sessions. An "actual knowledge" standard, while preferable to strict liability, does not establish a very wide comfort zone for publishers who monitor only for clean language and editorial purposes. In fact, *Netcom* may have the perverse result of encouraging such online publisher to either remove message boards (and thus decrease "interactivity") or to screen for bad language only through automated word-screening programs.

The precise question of whether online services are in a position to prevent unlawful activities such as copyright infringement was addressed by the Working Group on Intellectual Property Rights in its 1995 report.[26] The Working Group focused on the "business relationship" online services enter into with their subscribers through Terms of Service agreements and found that: "although indemnification from their subscribers may not reimburse them to the full extent of their liability and other measures may add to their cost of doing business, they are still in a better position

to prevent or stop infringement than the copyright owner. Between these two relatively innocent parties, the best policy is to hold the service provider liable."[27]

In a key passage, the Working Group struck the balance of responsibility in favor of online providers, but used the example of BBS operators—not service providers or online publishers—to support its reasoning:

The on-line services provide subscribers with the capability of uploading works because it attracts subscribers and increases usage—for which they are paid. Service providers reap rewards for infringing activity. It is difficult to argue that they should not bear the responsibilities. We are not aware that cost/benefit analyses have prompted service providers to discontinue such services. The risk of infringement liability is a legitimate cost of engaging in a business that causes harm to others, and that risk apparently has not outweighed the benefits for the more than 60,000 bulletin board operators currently in business.[28]

So the Working Group's advice to online services boils down to: (1) Sue your users when they post infringing material; or (2) Remove the interactive elements of your service. To be fair, the Working Group recognized that nature of online services varies from small BBS operators to major commercial services:

Different service providers play different roles—and those roles are changing and being created virtually every day. At this time in the development and change in the players and roles, it is not feasible to identify a priori those circumstances or situations under which service providers should have reduced liability. However, it is reasonable to assume that such situations could and should be identified through discussion and negotiation among the service providers, the content owners and the government. We strongly encourage such actions in the interest of providing certainty and clarity in this emerging area of commerce.[29]

Yet in the absence of legislation, the courts are stepping in to characterize online services, sometimes mistakenly, and to hold some services strictly liable for the actions of their users.

In the widely reported *Prodigy* case,[30] a lower New York court held that the commercial service was a "publisher" of defamatory statements made by one of its subscribers on its "Money Talk" bulletin board. The court found it significant that Prodigy engaged in a level of monitoring its chat rooms and bulletin boards (although Prodigy has no editorial process for identifying potentially libels) and was therefore more of a publisher than a common carrier. The case subsequently settled on a non-cash basis, but the decision sits on the books.[31]

This kind of user-directed bulletin board activity on the part of online services must be distinguished from functions where they consciously exploit copyrighted material. For example, CompuServe operated a database of music, allowing its users to upload, download and re-record popular songs.[32] Rightfully, the owners of the musical compositions filed suit and won a settlement reported at $560,000 for CompuServe's role in the infringement.[33] CompuServe will now enter into a license with music publishers for the right to distribute compositions online.

In the absence of government action and in the wake of an "actual knowledge" standard for copyright infringement, online services may still find encouragement from the final resolution of the *Netcom* case, where Judge Whyte has held out the possibility of a successful Fair Use defense by Netcom: "In balancing the various factors, the court finds that there is a question of fact as to whether there is a valid fair use defense * * * While copying all or most of a work will often preclude fair use, courts have recognized the fair use defense where the purpose of the use is beneficial to society, complete copying is necessary given the type of use, the purpose of the use is completely different than the purpose of the original, and there is no evidence that the use will significantly harm the market for the original."[34] And yet, given the increasing market for distribution of textual works online, it is unlikely that a court can find that BBS postings won't harm the market for the copyrighted works. After all, many online services are charging for downloads of books and articles.

The shopping mall

As more Americans spend time browsing the Web, the Web is beginning to resemble another favorite browsing space—a commercial mall. As electronic commerce takes hold, more merchandisers are offering more goods on the Web. MCI recently launched "Marketplace MCI." L.L. Bean has put its catalog online. Websites offering videos, calendars and magazine subscriptions have multiplied dramatically over the past few years.

Modern shopping malls, of course, not only feature outlets for commercial vendors (leased much like a BBS leases cyberspace from Netcom), but also public spaces where citizens enjoy music and special events.

In First Amendment terms, it has long been established that a commercial mall that welcomes the public has some obligation to allow citizens to exercise rights of free speech.[35] But, unlike online services, malls are not held liable for the content of speech of their visitors. Can one imagine a case where a mall owner was held legally responsible for the foul language used by a patron in one of its parking lots? Or how about a law suit against the builder of the parking lot for such activity? Yet, transposed to the world of electronic online communication, this degree of responsibility is suggested for builders (the Netcoms); mall owners (Prodigy, AOL), magazine/bookstore operators (bulletin boards), and the publishers of content that is on sale at the mall (Web-based sites such as Mr. Showbiz and CNN).

No one would seriously contend that a mall owner should be held liable for infringement of intellectual property rights caused by the activities of its lessees or visitors—say a record store that sold bootleg recordings or a clothing store that deceptively mislabeled knock-off designer fashions. However, online services find themselves facing these dilemmas due to functionality that allows for connectivity (e.g., hypertext links) and interactivity (e.g., chat and posted messages).

Conclusions

A full court press of legal issues—Privacy, Libel, Obscenity, Copyright Infringement—confronts those companies and individuals who are pioneering communication on the Internet and in the realm of private online services.

As discussed above, traditional legal ways of thinking about the responsibilities of publishers don't apply to electronic online services. Specific web sites may be hybirds of the following elements: common carriers, kiosks, dance halls, libraries, cable public access channels or even old-fashioned magazines (simply delivered in a digitized electronic format).

While a few courts have addressed online services with knowledge of this hybird capability, many more evince ignorance of these different dimensions and end up pinning liability on parties where such liability would be patently absurd in a traditional media environment. Education of the bar and judiciary, at this critical juncture in the birth of new communications technologies, is essential to a realistic understanding of how to analyze and police the exercise of rights in this new medium.

Legal precedents are not necessarily permanent, but once made leave an imprint that is hard to erase. With respect to rapidly evolving technology, misguided legal rulings can shape the evolution of commercial systems in perverse ways. If online services are mistakenly held responsible for speech-based activities of their users, they may calculate that open forums such as chat rooms and bulletin boards should be sharply curtailed or shut down. This not only harms the services, but those seeking self expression in such fora.

Electronic speech is still speech no matter how it is packaged and, in the best of worlds, should be allowed to flourish.

Glossary of online technical terms

Bulletin Board: A central computer running software that allows multiple people to access the same information and to post information. Virtually all bulletin boards are text and graphics only, although they could become capable of displaying audio-visual works.

Chat Room: A section of an online service where interactive textual communications occurs amongst a collection of people.

Home Page: The electronic page that serves as the front door of a Web Site. Home pages are addressed with a "URL"—uniform resource locator.

The Internet: A collection of computer networks that allows for the transmission of information between heterogeneous computers. There is no central point of control. Estimates of people using the Internet range from 5 to 40 million worldwide.[36]

Online Service: A private communications and computer network. AOL, Compuserve, Prodigy are the most prominent commercial online services.

Search Engine: A computer program that utilizes key word identification to find web sites and establish hypertext links to them.

Server: A computer which provides multiple users simultaneous access to information.

Systems Operators ("Sysops"): An individual hired to monitor chat room discussions and, in some cases, to stimulate discussion along certain themes and encourage participants to keep chat "on topic."

A Service Provider: The company that connects a computer or group of computers to a communications backbone, such as a regional Bell company network.

Web Browser: A software program which runs on a user's computer, which enables the user to easily traverse the World Wide Web.

Web Site: A collection of "documents" that are linked together using the http protocol. Most web sites are "authored" in html—hypertext markup language. Documents may contain text, graphics and audiovisual files.

The World Wide Web: A computer communications protocol (http or "hypertext transfer protocol") which links thousands of servers throughout the world. This protocol runs over the Internet. Also known as the "Web."

NOTES

[1] *Stratton Oakmont Inc.* v. *Prodigy Services Co.*, 23 Med. L. Rptr. 1794 (N.Y. Supreme Court, Nassau County 1995).

[2] *Cubby* v. *CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

[3] The pending telecommunications bill in Congress contains legal penalties for "indecent material," a standard far more troubling to free speech advocates than the traditional "obscenity" standard that governs print publications and linear media such as film and television.

[4] *The New York Times,* Nov. 20, 1995. "If the Medium Is the Message, the Message Is the Web, pages A!. C5.

[5] Starwave Corporation, for example, distributes four electronic services on the popular thoroughfare of the Internet known as the World Wide Web: ESPNET SportsZone, Outside Online, Family Planet and Mr. Showbiz. Each service contains: 1. News and original features; 2. Opinion columns; 3. Chat Rooms; 4. Electronic Polls and Letters to the Editor; 5. Audiovisual data such as television clips, music clips or audible short stories; and 6. Electronic Links to other venues on the Web, including advertisers, home pages and other sources of information. ESPNET SportsZone features both free content and premium content that can only be accessed after the user subscribes to the service (by filling out an electronic subscription form or by calling an 800 number).

[6] For instance, at Starwave, we use a software program that finds and deletes a combination of 18 "dirty" words, before they can be displayed on screen.

[7] *Stratton Oakmont Inc.* v. *Prodigy Services Co., supra.*

[8] *Dreamland Ball Room, Inc.* v. *Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929); *Famous Music Corp.* v. *Bay State Harness Horse Racing & Breeding Ass'n. Inc.*, 554 F.2d 1213 (1st Cir. 1977); *KECA Music, Inc.* v. *Dingus McGee's Co.* 432 F. Supp. 72 (W.D. Mo. 1977).

[9] *Shapiro, Bernstein & Co.* v. *H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

[10] See *Deutsch* v. *Arnold,* 98 F.2d 686, 688 (2d Cir. 1938) where the Second Circuit declined to find contributory infringement where the lessor had no knowledge of the intended use of the premises at the time of the signing of the lease.

[11] 17 U.S.C. Sec. 108(f)(1)(1988). The user of the equipment itself is subject to liability. 17 U.S.C. Sec. 108(f)(2)(1988).

[12] *RCA Records* v. *All-Fast Systems, Inc.*, 594 F. Supp. 335 (S.D.N.Y. 1984).

[13] *Sony Corp.* v. *Universal Studios, Inc.* 464 U.S. 417 (1984), where the majority focused on a Patent Act clause—35 U.S.C. Sec. 271(c)—providing that "Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patent process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

[14] *Sega Enterprises Ltd.* v. *MAPHIA,* 857 F. Supp. 679 (N.D. Cal. 1994), where MAPHIA was a bulletin board operator who promoted the "advertising, sale and distribution" of a machine that allowed for copying of video game cartridges. The court issued an injunction against the operator.

[15] *Vault Corp.* v. *Quaid Software Ltd.* 847 F.2d 255 (5th Cir. 1988).

[16] *The Death of Copyright in a Digital World: The Reports Are Slightly Exaggerated;* by Alex Alben, Entertainment Law Reporter, Volume 17, Number 2, July, 1995.

[17] *Stern* v. *Delphi Internet Services Corp.*, 23 Med. L. Rptr. 1789 (New York Supreme Court, New York County 1995).

[18] *Playboy Enterprises, Inc.* v. *Frena,* 839 F. Supp. 1552 (M.D. Fla. 1993).

[19] *Sega Enterprises Ltd.* v. *MAPHIA,* 857 F. Supp. 679 (N.D. Cal. 1994).

[20] Id. at 686–687.

[21] *Religious Technology Center* v. *Netcom On-Line Communications Services, Inc.*, No. C–95–20091 (N.D. Cal. 1995).

[22] Id. at p. 8.

[23] Id at p. 8. fn. 12.

[24] NIMMER ON COPYRIGHT Sec. 12.04[B][3], at 12–99 (1995).

[25] *Netcom, supra,* at p. 9.

[26] Intellectual Property and the National Information Infrastructure, The Report of the Working Group on Intellectual Property Rights (1995) ("Working Group Report").

[27] Id. at 117, emphasis added.

[28] Id. at 117–118, citations omitted.

[29] Id. at 123.

[30] *Stratton Oakmont,* v. *Prodigy,* No. 31063/94, 1995 WL 323710 (N.Y. Sup. May 24, 1995).

[31] The New York Times, Nov.—, 1995, p.

[32] *Frank Music Corp.* v. *CompuServe Inc.*, Civil Action No. 93Civ 8153 (JFK) (S.D.N.Y.) (complaint filed Nov. 29, 1993).

[33] The New York Times, Nov.—, 1995, p.

[34] *Netcom, supra,* at 27.

[35] *Pruneyard Shopping Center* v. *Robbins,* 100 S. Ct. 2035 (1980).

[36] The Seattle Times, Personal Technology, "How Many Use the Internet? It's hard to say." January 14, 1996, page C2.

PREPARED STATEMENT OF AMERICAN COMMITTEE FOR INTEROPERABLE SYSTEMS

ACIS members include many of the cutting edge technology leaders of Internet-related software, hardware and services. Even on the front line of this phenomenal revolution, it is extremely difficult for us to predict what the information infrastructure will look like in five or ten years, let alone how to maximize its commercial potential. Some of our members have been in existence since the dawn of the computer age—indeed, some have been in existence since the dawn of the mechanical cash register—yet none of us remember a period of change as rapid as what we have experienced over the past few years with the explosive growth of the Internet generally and the World Wide Web in particular. Given this uncertainty, we believe that there is no way to know whether S. 1284 will increase the commercial potential of the National Information Infrastructure. In fact, we are concerned that S. 1284, as currently drafted, could just as easily have the unintended affect of stifling innovation in this exciting new age.

A product announcement from just last week demonstrates this point clearly. On Thursday, May 9, IBM unveiled its Cryptolope technology, which allows owners to regulate the distribution of their copyrighted works on the Internet. This technology may well obviate the need for much of S. 1284. At the same time, this legislation may reduce the incentive for technology companies to search for more innovative solutions to the problem of cyberspace piracy.

Individual members of ACIS have a variety of concerns with S. 1284, but ACIS, which is dedicated to promoting intellectual property laws favorable to software interoperability, is particularly troubled by proposed Section 1201. The thrust of the proposed Section 1201 is to prohibit the importation, manufacture and distribution of devices that circumvent a system or process that prevents illegal copying of protected works. We are not opposed to the idea of prohibiting the circumvention of devices that prevent piracy; however, it is absolutely essential that any such provision must be carefully drafted so as not to prevent legitimate activities. We believe that the current formulation of Section 1201 would seriously impede software innovation and interoperability by making it too risky, from a liability point of view, to create many legitimate products. A legislative proposal to address our concerns is attached.

We also believe that Section 1202 raises interoperability concerns, and that the issue of random access memory (RAM) copies, which has been improperly addressed in the House, needs to be considered in a broader context.

I. PROPOSED SECTION 1201 ENDANGERS SOFTWARE INNOVATION AND INTEROPERABILITY

Section 1201 would outlaw any device if its "primary purpose or effect" is to circumvent any technology used to protect proprietors' rights. The difficulty in applying this test arises because a developer cannot necessarily predict what the primary purpose or effect of her product will be—market forces and consumers will determine that.

Not all copies are infringing copies. The copying of limited passages from copyrighted novels and memoirs is permitted under the fair use doctrine; similarly, the wholesale copying of works whose copyright term has expired is completely lawful. Courts in three circuits have also excused the copying incidental to software reverse engineering when it is performed to achieve interoperability. If a firm developed a technology that prevented the making of these copies, a device that circumvented that technology might run afoul of the new Section 1201. The outlawing of such devices would inhibit lawful reverse engineering which in turn would retard the interoperability of the software and hardware components of the NII. In the absence of interoperability, competition would be hampered and innovation would stagnate.

ACIS raised this concern when the Intellectual Property Rights Working Group released its July, 1994 draft Green Paper. The Working Group's final White Paper responded by asserting that Section 1201 would not prohibit an anticopy circumvention device "primarily intended and used for legal purposes." This, however, is an inadequate answer, since, as already stated, the developer cannot necessarily predict how his device will be "primarily" used. Thus, this provision would cause a chilling effect on the development of new and valuable products.

The White Paper conceded the validity of this concern by proposing an "innocent violator" provision. This provision, unfortunately, does not provide adequate protection for legitimate developers. Section 1203(c)(5) would allow a court in its discretion to reduce the award of damages if the violator proves that it "was not aware and had no reason to believe that its acts constituted a violation." Although the meaning

of the "no reason to believe" standard is obscure, it would appear that few developers would be able to demonstrate that they had "no reason to believe" that their circumvention device might ultimately be used primarily for unlawful purposes. Moreover, the provision provides the innocent violator with relief from damages, but not from injunctions.

Section 1201 would also have a disproportionate impact on small software firms. A large firm interested in circumventing anticopy devices for lawful purposes might still be able to obtain the necessary technology, either by developing it in-house (where the firm has complete control and can ensure that it is only used for lawful purposes) or by purchasing it from a third party whom it promises to indemnify against Section 1201 claims. A small firm, conversely, will not have the resources to develop the technology internally, and the third party will refuse to supply it with the technology because the small firm's indemnification agreement will have no value.

At this point, we must respond to a point made by one of the witnesses at the May 7, 1996 hearing. A witness from a software firm in his written statement contrasted conventional piracy where unauthorized copies of his company's software were sold in counterfeit packages, with the new form of piracy where unauthorized copies could be rapidly distributed around the globe via the Internet. The witness correctly noted that while conventional piracy was bad for his company, the new form posed a far greater threat.

In his oral testimony, however, the witness departed from his written statement when describing conventional piracy. Instead of speaking of the wholesale copying of programs, the witness referred to the decompilation of his company's software and the reconfiguration of the resulting source code. In this manner, the witness tried to raise the specter of how the software reverse engineering technique of decompilation can be used to facilitate disguised piracy. The opponents of interoperability wave the bloody shirt of disguised piracy whenever they seek to prohibit decompilation. To date, however, there has been no documented instance of such disguised piracy. And you don't have to take our word on this, neither the Office of Technology Assessment nor the Australian Copyright Law Review Commission could find any evidence of this practice.

The implausibility of decompilation being used to facilitate piracy was demonstrated by the witness's example. He spoke of how "pirates" decompiled his company's software, reconfigured the resulting source code, and then sold the software in counterfeit packages. But if the pirate sold the copies in counterfeit packages, why would he try to disguise the piracy—why would he try to make the software look different from the original software? On the contrary, he would want his software to look identical to the original. By repeating the canard about decompilation facilitating disguised piracy, the witness revealed why some party within the software industry support Section 1201 so strongly; because it would interfere with legitimate reverse engineering aimed at permitting interoperability.

II. THE WHITE PAPER ANALOGIES IN SUPPORT OF SECTION 1201 ARE INAPPOSITE

In their explanation of the Section, the Administration's White Paper suggests that the provisions contained in the Audio Home Recording Act that prevents the importation, manufacture or distribution of devices that circumvent a Serial Copy Management System (SCMS) provides a justification for Section 1201. This is not the case. In digital audio recording systems that employ a SCMS, the scheme allows the end-user to make at least one digital (and unlimited analog) copies of a digital original. Thus, the SCMS provides a adequate accommodation to the fair use of copyrighted works and to the making of copies for other legal purposes. The proposed Section 1201 provides no such accommodation, however, because a copyright holder may implement a scheme whereby no copies of the work, lawful and unlawful, may be made.

Likewise, Section 605 of the Communication Act is not analogous to most situations that would be covered by the proposed Section 1201. Section 605 prohibits devices that allow the unauthorized decryption of satellite cable programming. Such decryption is fundamentally different from making copies of protected works because such authorized decryption involves gaining access to a signal that the recipient has no legal entitlement to have. On the other hand, the lawful owner of a copy of a work not only has the right to view the work but in some instances may make copies of the work without infringing the copyright. A broad prohibition on decryption devices might therefore be tolerable in a licensed satellite cable programming context, but a prohibition similar to the proposed Section 1201 is not appropriate in the broader copyright context.

To the extent Section 605 is a precedent, it demonstrates the deficiencies of Section 1201. Section 605 targets only persons "knowing or having reason to know" that the device they manufacture "is primarily of assistance in * * * unauthorized decryption." Section 1201 lacks this scienter requirement.

III. PROPOSED SECTION 1201 IS RIFE WITH AMBIGUITIES

As noted above, the White Paper states that so long as the device in question is primarily intended and used for legal purposes, such as fair use, then such a device would not violate the provisions because it would fall within the "authorized by law" exemption. The actual language of the provision, however, does not readily support this reading. The so called "authorized by law" exemption applies by its terms to the act of disabling or circumventing the anticopy technology. However, the fair use doctrine and any other provision of the Copyright Act that "authorizes" copying does not apply to the act of disablement and circumvention; rather, it applies to the copying of the ultimately targeted work. The anticopy technology itself may or may not be subject to copyright protection, and the means of circumventing it may or may not be a fair use; yet this question remains independent of whether the copying of the ultimately targeted work is a fair use.

The "primary purpose" test also is ambiguous. As Section 1201 is drafted, it is unclear whose purpose should be considered. Similarly, the term "primary effect" is vague and difficult to apply. If a device is used for one unlawful purpose 40% of the time, and for two different lawful purposes 35% of the time respectively, is the "primary effect" lawful or unlawful? And what if a device is used unlawfully only 10% of the time, but the value of the copies made by this 10% exceeds the value of the lawfully made copies? Further, demonstrating the "primary effect" of a product will require expensive market studies and expert testimony. In short, Section 1201 as drafted invites complex litigation.

IV. SECTION 1201 REVERSES THE SUPREME COURT'S BETAMAX DECISION

In the *Betamax* case, the Supreme Court considered whether the manufacturer of a recording device should be liable for the reproduction of copyrighted material by purchasers of the recording device. The Supreme Court held that because the Betamax was "capable of substantial non-infringing uses, Sony's sale of such equipment to the general public did not constitute" contributory copyright infringement. In so holding, the Supreme Court established that devices which are capable of "substantial non-infringing uses" should not be prohibited. The great irony of Section 1201 is that it would impose higher standards on anticopy circumvention devices than the Supreme Court placed on copying devices themselves. If anything, anticopy circumvention devices should be held to a lower standard than copying devices. It is the copying that is causing the real injury, not the anticopy circumvention device. However, our legislative language that is attached does not attempt to remove all liability from the anticopy circumvention device. Instead, our language says that if the device has no substantial non-infringing use, than the device could contribute to infringement and is made illegal. Our proposal arguably imposes a stricter standard than current law, yet at the same time it provides developers of legitimate, innovative products sufficient legal certainty to continue to bring new and innovative products to market.

V. OTHER INTEROPERABILITY CONCERNS—SECTION 1202; RAM COPIES

Section 1202, which prohibits the distribution of products with false copyright management information (CMI), seems benign but it could be interpreted in a manner that impedes interoperability. Some hardware or software platforms permit programs to run on them only if the programs identify themselves as products developed by the creator of the hardware of software platform. If another software firm wants to market a product that can run on that platform, it must send a "false" designation of origin. At least two cases have correctly found that the sending of such a false designation violates neither the copyright nor trade market laws, and we believe that the false designation should not be considered false copyright management information under section 1202. Nonetheless, the Senate should ensure that a court would not mistakenly treat it as such.

The Senate also needs to consider the issue of random access memory (RAM) copies more closely. The White Paper, following the *MAI* v. *Peak* decision, views RAM copies as infringements. The House Judiciary Committee, as part of its technical correction act, H.R. 1861, amended 17 U.S.C. § 117 to permit RAM copies made during the servicing of computer hardware. We are concerned that such a narrow exception may have a negative impact on interoperability, as demonstrated by the Fifth Circuit's recent decision in *DSC* v. *DGI*. In that case, DSC contended that

RAM copies of the DSC operating system made by DGI while its was testing a component designed to interoperate with the DSC system was an infringement pursuant to *MAI* v. *Peak*. The Fifth Circuit held that pursuing a RAM copy theory to prevent interoperability could constitute copyright misuse.

Although the court in this instance reached the right result, we do not feel that an issue as important to interoperability and the NII as RAM copying should be the subject of narrow, "technical" corrections or should be addressed piece-meal by the courts as misuse or fair use. Instead, the Senate should consider the RAM copy issue comprehensively in the context of this legislation. Indeed, an entire day of hearings should be devoted to it. We hope that the Committee, after such hearings, adopts the recommendations of the Digital Future Coalition relating to RAM copies.

VI. CONCLUSION

We urge Chairman Hatch to amend Section 1201 to address the concerns stated here. We believe the legislative proposal we have attached provides a balanced approach to addressing this issue. We look forward to working with the committee on resolution of this issue, as well as the others we have identified.

The American Committee for Interoperable Systems (ACIS) is an informal organization of almost 40 companies that develop innovative software and hardware products that interact with computer systems developed by other companies. ACIS was formed in 1991 to support intellectual property law policies providing for a careful balance between the goals of strong protection and incentives for innovation on the one hand, and the goals of interoperability, fair competition, and open systems on the other.

§ 1201. Circumvention of Copyright Protection Systems [Alternate]

No person shall import, manufacture or distribute any device[,] *or* product, [or component incorporated into a device or product,] or offer or perform any service, the [primary purpose or] effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without the authority of the copyright owner or the law, any process, treatment, mechanism or system which prevents or inhibits the [violation] *infringement* of any of the exclusive rights of the copyright owner under section 106 *knowing that the device, product, or service cannot enable a substantial non-infringing use.*

ACIS MEMBERS

Accolade, Inc.
Advanced Micro Devices, Inc.
Amdahl Corporation.
America Online, Inc.
Broderbund Software, Inc.
Bull HN Information Systems, Inc.
Chips and Technologies, Inc.
Clearpoint Research Corporation.
Color Dreams, Inc.
Comdisco, Inc.
Emulex Corporation.
Forecross Corporation.
The Fortel Group.
Fujitsu Systems Business of America, Inc.
Hitachi Data Systems.
ICTV.
Johnson-Laird, Inc.
Kapor Enterprises, Inc.
Landmark Systems Corporation.
LCS/Telegraphics.
MidCore Software, Inc.
NCR Corporation.
New York Systems Exchange, Inc.
Octel Communications Corporation.
Passage Systems, Inc.
Phoenix Technologies, Ltd.
Plimoth Research Inc.
Seagate Technology, Inc.

Software Association of Oregon.[1]
Software Entrepreneurs Forum.[2]
Storage Technology Corporation.
Sun Microsystems, Inc.
Tandem Computers, Inc.
3Com Corporation.
Western Digital Corporation.
Zenith Data Systems Corporation.

PREPARED STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION

The American Farm Bureau Federation is pleased to have this opportunity to submit its comments to the Senate Judiciary Committee on behalf of its members.

The American Farm Bureau Federation (Farm Bureau) was founded in 1920 as an Illinois non-profit corporation with headquarters in Park Ridge, Illinois. It is comprised of state Farm Bureau organizations in each of the 50 states, and Puerto Rico, which, in turn, are comprised of county Farm Bureau organizations organized in virtually every county in America. The Farm Bureau speaks as the voice of American agriculture representing over 4 million farmer and rancher families and others who support its policies and purposes. The U.S. agricultural industry, like many other industries, in the U.S., has become driven by technological developments, including those in the computer industry. The ability to collect, store and retrieve data and to turn that data into useful information for business and scientific decisions is as essential to U.S. agriculture as to other industries. Accordingly, any amendments to the U.S. Copyright Act, including those proposed in S. 1284, are of crucial importance to the Farm Bureau and its members.

A key concern of the Farm Bureau is the protection to be afforded to databases and related privacy interests, issues which are not addressed in the proposed legislation. The Farm Bureau's position on these issues is detailed in the testimony it previously provided to The Working Group on Intellectual Property Rights and The National Information Infrastructure Task Force concerning the Task Force Reports which proposed revisions to the U.S. Copyright Act. A copy of that testimony is attached hereto and incorporated herein by reference.

In view of the current "negotiating sessions" occurring before the House of Representatives Subcommittee on Courts and Intellectual Property, the Farm Bureau is concerned that this Committee's hearings on S. 1284 will engender similar attempts to engraft language regarding additional copyright issues into the legislation without appropriate study. The Farm Bureau sincerely hopes that this does not occur. However, if there are attempts to broaden the scope of S. 1284, it wishes to make certain that the concerns of U.S. agriculture regarding the development of the National Information Infrastructure are clearly heard. Accordingly, the Farm Bureau submits herewith the attached statement of its views in this regard.

Chairman Lehman and distinguished members of the Working Group on Intellectual Property Rights, I am pleased to have this opportunity to make a brief presentation to you on behalf of the American Farm Bureau Federation ("the Farm Bureau").

Since most of the witnesses who have testified before you and those who come after I speak are from other sectors of the American economy and since you may not be aware of the Farm Bureau or what we do, I will begin today with a short background on the Farm Bureau itself as a preamble to my specific comments on the Preliminary Draft Report. Following that summary history of the Farm Bureau, I will focus my remarks upon three responses about the work of the Information Infrastructure Task Force on the National Information Infrastructure and the legal review which is being done by your specific Working Group on Intellectual Property Rights:

First, the National Information Infrastructure materials put forward by the Department of Commerce have not focused on the needs of America's farmers and ranchers, who also require advanced information technologies to remain competitive and engaged with the rest of the American economy.

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[1] The Software Association of Oregon consists of 430 software development firms, firms in associated industries, and individuals professionally involved in software development.

[2] The Software Entrepreneurs Forum consists of over 1,000 software entrepreneurs and developers.

Second, it is important to involve the interests of American agriculture in your deliberations and to be aware of current major programs within American agriculture, such as site specific farming, electronic tagging of farm animals and the like, and to harness the power of the "information highway" for the benefit of farmers and thus avoid adopting policy changes which would be adverse to American agriculture.

Third, in light of one major program being studied at this time by the Farm Bureau—the development of standard communications protocols for site-specific farming and then the establishment of nationwide databases for the collection and use of such data—the Farm Bureau urges legal revisions to protect such databases from copyright and other infringements, privacy violations, and misappropriation of confidential business information and trade secrets under U.S. copyright law and under other statutes.

1. THE HISTORY AND ROLE OF THE FARM BUREAU

U.S. farmers produce abundant and safe food and fiber products for domestic consumption and export throughout the globe. These producers need to be included in your vision for the technological future of America and, more specifically, in your legal deliberations on revisions in our nation's intellectual property laws.

The Farm Bureau was founded in 1919 as an Illinois non-profit corporation which has its national headquarters in Park Ridge, Illinois, not that far from this hearing room. It is a federation comprised of state Farm Bureaus in each of the 50 states, and Puerto Rico, which, in turn, are comprised of county Farm Bureaus organized in virtually every county in America. The Farm Bureau thus speaks as the voice of American agriculture representing over 4 million member families who are America's independent farmers and others who support the policies and purposes of the Farm Bureau.

At the state and county level, the Farm Bureau operates to provide a variety of agricultural assistance and educational programs to its members and to monitor state legislation and regulatory authorities. Our members are most active at the local level of government activities—county boards, school boards and wide variety of other civic forums, Farm Bureau members and leaders have had major roles in all forms of agri-business activities. At the national level, the Farm Bureau reviews Congressional legislation and regulatory activities which may impact farmers, whether in the areas of agricultural assistance or in such diverse fields as environmental regulation, biotechnology, health and safety laws, farm labor rules, and import and export of agricultural commodities. To coordinate these federal activities, the Farm Bureau also has a fulltime staff of government relations specialists in its Washington, D.C. office. From the most rural county to the nation's capital, the Farm Bureau's agenda encompasses virtually every aspect of the working farmer's operations and daily life.

The Farm Bureau has taken a longstanding and active role in the development of U.S. intellectual property laws with regard to the Plant Variety Protection Act (7 U.S.C. §2321 et seq.), the various debates on biotechnology patents, the patenting of plant varieties and livestock, and other similar issues. Our organization is thus pleased to provide some additional input to you and your colleagues today regarding the next generation of intellectual property law issues that will affect America's farmers.

2. THE NATIONAL INFORMATION INFRASTRUCTURE AND THE AMERICAN FARMER

America's farmers today feed and clothe our society with safer, more abundant and more wholesome food products than anywhere else on the face of the earth. Indeed, with only 1.6% of the workforce, in 1992, America's farmers produced nearly 9% of the value in this nation's total exports. Such enormous growth in per capita productivity for our farmers has been due mostly to one single factor: technology. Due to use of improved seeds and livestock, sophisticated farm implements and better and safer fertilizers, pesticides and herbicides, and better crop and livestock management practices, U.S. farmers have become the most productive and efficient farmers in the world.

Today's American farmer is a technologically-adept person who must have a considerable working knowledge of chemistry, biology, meteorology, soil engineering, mechanical engineering, and, increasingly, information technology. While the last 150 years have seen enormous gains in our agricultural productivity from improvements in the traditional inputs—our seeds and breeding animals, our fertilizers, and our agents for the control of pests and weeds—the next generation of gains must be driven by the power of the computer and microelectronics.

As in other sections of our nation's economy, the ability to collect, store and retrieve data and to turn that data into useful information for business and scientific decisions will become essential for every level and type of U.S. agriculture.

It is that new paradigm that needs to be considered by the Commerce Department. In the NIST publication released in May, 1994, No. 857, Putting the Information Infrastructure to Work: A Report on the Information Infrastructure Task Force Committee on Applications and Technology, the Committee on Applications and Technology, mapped out eight sectors in American society that would "develop, demonstrate and promote applications of information technology" (to quote Secretary Brown's introduction): manufacturing, electronics, commerce, education, health care, government services, libraries and environmental monitoring. The document is singularly silent about how those advances would or could be applied in American Agriculture.

The only reference in the NIST document about agriculture pertains to the U.S. Department of Agriculture (p. 62) and its role in agricultural education programs; nothing is said about farmers themselves or how they will be active (or even passive) participants in the "information highway". This will result in an incomplete policy for the nation's technological future if it is not corrected. I am here today, therefore, to ask you and your colleagues to consider agriculture's role in your deliberations and to make room for our input as farmers. We have a common stake in the future of American agriculture.

3. SOME NEW TECHNOLOGIES IN AMERICAN AGRICULTURE

The ubiquitous personal computer is as common on the American farm today as it is in America's offices, shops and factories. America's farmers already use such computers to manage their financial affairs, to regulate their inventory of supplies and inputs, and to store and analyze historical data on crop and livestock production. Increasingly, with the spread of on-line services and modems, U.S. farmers are also able to join widely dispersed networks that range in services from commodity pricing to "just in time" arrangements with suppliers, shippers and elevator operators to weather and crop forecasting.

I would like to outline two specific initiatives now being explored in American agriculture that depend upon advanced microelectronics and information technology and then to highlight how the Green Paper of your Working Group potentially impacts our efforts to advance agriculture.

a. Site specific farming

One of the most promising new concepts in American agriculture is known as "site specific farming" or, more informally, "farming by the foot." This concept, which is being tried experimentally throughout the nation, involves the following elements installed on agricultural equipment, such as tractors, planters, combines, fertilizer trucks or applicators: Global Positioning Satellite (GPS) monitors; Laptop or other portable computers with appropriate Geographic Information Systems (GIS) Software; Biosensors which monitor soil or other conditions; and Measuring instruments which monitor and control the type and amount of agricultural inputs such as seed, fertilizer, pesticides or herbicides which are applied.

As a farmer maps his or her farm with the GPS equipment, the farmer can also record how each square meter of that farm is being farmed; what inputs are being placed upon each square meter, under what conditions, and then what outputs are being achieved. As a farmer builds up records for that farm, year after year, the farmer can systematically adjust inputs to achieve optimal outputs by the square meter, all calibrated with the help of the GPS monitors and the network of GPS satellites operated by the U.S. Defense Department. Major improvements in input utilization efficiency have already been demonstrated in these pilot programs. If widely adopted, this "silicon revolution" on the American farm could massively impact environmental conditions by adjusted usage of farm chemicals, reduce farming costs and improving farm profitability.

However, the promise of site specific farming goes beyond the data that could be accumulated by each individual farmer, beneficial as that might be. Farm Bureau as well as a number of other groups, is examining the adoption and implementation of data communications protocols that would establish new national standards for suppliers of hardware and software used in site specific farming. Today, there are dozens of individual vendors whose equipment and software cannot interoperate and hence whose data are not portable from application program to application program. These fundamental incompatibilities stem from the absence of widely accepted standards, a problem similar to that in many other fields of data communications (e.g., in the process control and factory automation environments).

Once these standards can be established, the Farm Bureau and others envision a series of vast new cooperative databases that can be built up at the county, state and national levels, all on a voluntary basis, with standardized data contributions made electronically by the participating farmers. Through such aggregate databases, to be established and administered by new organizations not yet in existence, individual farmers could go beyond their own individual farms to tap the experiences of similarly situated farmers in neighboring communities or even across the nation.

We envision this set of databases will create unimagined opportunities for interactive communications with farmers and interactive data analyses everywhere in the nation. The push for more and more wireless communications may combine with these efforts to create virtually realtime input of data from the field to the database of the individual farmer and to the larger aggregate databases noted above. The sheer volume of data collected in these databases, over millions of square meters of farm land and over years of farming, will be staggering.

It is estimated that 20% of the United States' 9.1 million square kilometers of land area would be considered "arable" and suitable for agricultural purposes, or approximately 1.8 million square kilometers. That total arable land in the United States therefore contains 1.8×10^{12} individual square meters, each of which would potentially yield hundreds of data points every time a tractor, combine or other agricultural implement rolled over that square meter, day after day, week after week, month after month, year after year. Even those of us within agriculture who are working at these technological frontiers cannot conceive of all the management and implementations, not to mention exploitation, issues which will arise with the aggregation of so much data.

Built up over time and with the participation of thousands and eventually hundreds of thousands of farmers across the country, these databases will eventually provide massive and unprecedented amounts of digitized information that would serve multiple users, including:

Individual farmers, who must select and apply inputs to yield optimal outputs;

Farm equipment manufacturers, who must design and build new and ever-more sophisticated implements for such "high tech" farming;

Farm chemical suppliers, who must make and sell appropriate farm fertilizer, herbicides and pesticides in the form and quantity needed for each local market;

Food processors, who buy the output of commodity producers;

Agricultural industry analysts, private and public, who need accurate and timely data for forecasting and policy recommendations;

Government agencies which could subscribe to databases for regulatory purposes.

Agricultural science researchers in universities and land grant colleges.

b. Electronic tagging of livestock

There are approximately 150,000,000 large farm animals that are slaughtered for food and other uses in the United States each year. With the advances in inexpensive microelectronics, implantable chips are just now coming on to the agricultural market to enable livestock producers to tag and track every such large farm animal essentially from conception to consumption.

As with crop production, it will be possible to collect and analyze huge amounts of genetic and growth data through the increasing use of such bioimplants. Individual farmers may collect data for the animals on their own farms, and, as with the site specific farming databases outline above, they may also pool their data for more statistically powerful predictive or historical studies, based upon year after year of animal production data.

These efforts to use advanced information technologies for animal production will also depend upon vast collaborative efforts of users and vendors to standardize communications protocols and then to establish and maintain the resulting sophisticated databases.

c. Farm Bureau task force

The Farm Bureau has appointed a national task force to study standards and databases to consider the technical and economic implications of such advanced technologies.

Just as Electronic Data Interchange (EDI) has had a profound impact upon banking and commercial transactions all over this country and in international business, the Farm Bureau's task force is rapidly coming to a conclusion that these agricultural data standards and databases will have at least as dramatic an effect upon the way farming is done in this country and, potentially, all over the world.

4. DATABASE PROTECTION AND THE GREEN PAPER ON INTELLECTUAL PROPERTY

The Farm Bureau has only recently had an opportunity to study the details of your Working Group's Green Paper on Intellectual Property. However, in light of the Farm Bureau's inquiries regarding data standards and database projects, the Farm Bureau has identified one key omission that should be addressed in your group's future work: adequate statutory protection for private databases under U.S. copyright law.

The current state of the law in the United States (and elsewhere in the world) is unacceptably vague and confused as to copyright protection for computerized databases. The Farm Bureau cannot conceive of long-term, stable collection and utilization of site specific farming or farm animal agricultural databases, without a statutory revision of the Copyright Act. Your Working Group has focused on efforts to refine the Copyright Act through the addition or amendment of such key terms in copyright law as "transmission," "publication," and "distribution". In the process, your Green Paper (at p. 12 fn. 18) has cited to but not elaborated upon a major U.S. Supreme Court case that has thrown a huge shadow over the protection of databases. Indeed, the only reference to "compilations" in your Green Paper (at p. 27) only refers to the narrowest of black letter definitions and does not even use the word "database," although that is the central type of compilation at issue in the era of the "information highway."

The case which has caused the greatest uncertainty with regard to databases is *Feist Publications, Inc.* v *Rural Tele. Serv. Co. Inc.,* 499 U.S. 340 (1991). The Farm Bureau is deeply concerned that the *Feist* Court failed to define what "selection coordination and/or arrangement" will constitute sufficient "originality" to qualify for the copyright/protection of databases. This uncertainty will ultimately damage the Farm Bureau's efforts to induce U.S. farmers to invest their labor and funds in participatory databases that would be essential to maximization of the site specific farming concept. Indeed, we believe that this single case and its growing progeny of lower court decisions is sowing needless uncertainty over all commercial databases that will be an integral part of the National Information Infrastructure.

Once the communications protocols for site specific farming or farm animal bioimplants, for example, become widely publicized and available as "open standards" for industrial use, it is at least arguable under the *Feist* standard that the resulting databases built upon data collected and organized using those necessarily universal formats will be unprotected (and unprotectable) under U.S. Copyright law. Will the established data fields within these agricultural communications protocols be viewed by federal courts as the equivalent of the arrangement of names, towns and telephone numbers in the telephone directories at issue in *Feist*?

If American farmers are to invest their time, energy and capital into such ventures for the ultimate benefit of our nation, it is crucial that they not be set up to have these investments taken from them. The Farm Bureau therefore urges this Working Group to add the property rights implications of such aggregate databases to its action agenda and to help resolve the legal ambiguity in this area of intellectual property law.

Initial projections indicate that many millions of dollars, will be spent by individual farmers, hardware and software vendors, equipment manufacturers and the database organizations in establishing and promulgating the communications protocols as industry standards within agricultural information technology and then in establishing and maintaining the databases built with the data collected on the basis of those standards. It is impossible to begin such a massive financial and operational investment without a firm understanding that those compilations of farming data will be properly protected under U.S. copyright laws.

Since 1987, the Copyright Office has had regulations specifically tailored to the registration of compilations and databases. See 52 Fed. Reg. 37,167 (October 5, 1987). Circular 65 of the Copyright Office contains instructions for the registration of such materials. With all due respect, the Farm Bureau submits that those procedures, in and of themselves, are illusory and will not suffice to create the necessary legal foundation for agricultural (or any other) databases unless Congress intervenes in this muddy area and brings order to this confusion. The "information highway" will have little value if its most valuable traffic can be highjacked by pirates with legal impunity.

As one legal scholar has written in a leading treatise:

"Although it is clear at this point that the protection afforded by the copyright laws regarding database (after the *Feist* decision) is thin, it is better than nothing. In the future, the Supreme Court might narrow the scope of *Feist* or the lower courts might fashion novel theories and rationales to protect databases. Additionally, Congress might pass legislation that provides greater protection of copyrighted

databases than is now afforded them by current case and statutory law. The European Community is now advancing such a proposal. 2 L.J. Kutten, Computer Software § 18.03[3] (1993)."

The Farm Bureau believes America needs and deserves legal protection for database compilations that is decidedly better than "thin" if the National Information Infrastructure is to be fully realized. Your Working Group is ideally situated to rectify this problem in our country's intellectual property laws.

Furthermore, it is not even sufficient that Congress or the courts make computerized databases more clearly protected by U.S. copyright law. The Farm Bureau fears that one emphasis of the National Information Infrastructure philosophy may be to erode both the property and privacy interests in such private databases in the name of "public welfare." At p. 133 of your Green Paper (emphasis supplied) it is said:

"The Copyright Act exists for the benefit of the public. To fulfill its constitutional purpose, the law should strive to make the information contained in protected works of authorship freely available to the public. "Freely available", of course, does not mean "available free." The Working Group does not believe that authors should be required to donate access time to their works on-line, but some reasonable approach must be adopted to ensure that the economically disadvantaged in this country are not further disadvantaged or disenfranchised by the information revolution."

The Farm Bureau cannot be assured by this "on the one hand, but on the other hand" ambivalence about access to agricultural databases that could become potentially more valuable than any other farm commodity. The Farm Bureau has long stood for the concepts of private property and the protection of personal privacy from undue government surveillance and regulation. Thus, even if databases become more clearly subject to copyright protection, will the Federal Government carve out exceptions for compulsory licensing to "deserving groups" or allow its own agencies to expropriate this property for its own ends?

If these site specific farming or farm animal production databases are established by the Farm Bureau and its collaborators, they will contain mountains of sensitive information at least as private, at least as revealing and at least as valuable as bank or medical records. The Farm Bureau therefore urges the adoption of clear and specific legislation that would bar members of the general public or federal agencies from unregulated and free access to such databases. Compare 12 U.S.C. § 3406 and 3407 (financial and banking records); 42 U.S.C. § 290dd-3 (medical records relating to drug or alcohol treatment); see generally 9 U.S. Department of Justice Manual Chap. 19 ("Documentary Material Held by third Parties").

These agricultural database compilations will not be established with public funds and consequently ought not to be treated as if they were public property. Accordingly, no citizen or group of citizens, regardless of their degree of "disadvantage," has any "right" to access to these databases. That rule must be clearly stated and clearly understood in the law. We urge this Working Group to take a strong and clear stand against any form of compulsory licensing for databases as a necessary corollary to copyright protection for such compilations. Furthermore, the "fair use" doctrine, which your Green Paper addresses, must not be allowed to create a "backdoor" for violating the property rights of database organizations. We support your Green Paper's proposal to create a right of action for copyright infringement against persons who are using the National Information Infrastructure to gain unauthorized electronic access to and use of private databases such as those contemplated by the Farm Bureau.

Although it is not strictly a matter of intellectual property law, there is a further legal dimension that must be noted in regard to private databases. No federal agency should be allowed access to these databases for any kind of regulatory or investigative purposes except with proper safeguards of the type now used to deter and control unfettered government access to personal banking or medical records; access shall be made solely and exclusively by means of a grand jury subpoena or, in exigent circumstances, with judicially supervised search warrants. While it is possible and even desirable that such electronic data may lead to voluntary electronic filing of certain information with federal regulators there should be an express statutory ban upon any mandatory access by such government agencies.

Finally, once federal regulators do have lawful access to such proprietary information of farmers, the information must remain proprietary. The Freedom of Information Act and other federal laws and regulations must be examined to ensure that federal agencies will treat such data with appropriate care, given its commercial value. A useful model for reference and drafting purposes may be the 1988 Computer Matching and Privacy Protection Act, 5 U.S.C. § 552a et seq. which dealt with many of the personal privacy issues of government agency access to multiple computerized databases maintained by the U.S. Government itself and how data in

those databases must be guarded to ensure the maintenance of the privacy interests of citizens.

5. SUMMARY

In summation, Mr. Chairman, on behalf of American farmers, the Farm Bureau recommends three specific steps in your Working Group's review and proposed revision of U.S.

(1) Make a separate study of the need to provide express statutory protection under the copyright laws or under a new statutory scheme for private computerized databases and similar compilations so as to reverse or at least to clarify the law after the *Feist* decision by the U.S. Supreme Court. In so doing, examine the model of the European Community's proposed directive for the protection of databases. Further, care should be given to implementation of legal and technical systems to protect the confidential business information and trade secrets of the agricultural community which will reside in such collective databases.

(2) Even if private databases become more clearly protected as works of authorship under U.S. copyright laws, to protect the property rights inherent in those works, separate legislation is needed to ensure their recognition as private property and as not being subject to any compulsory licensing so as to make such databases "available to the disadvantaged" unless the government is going to pay the database operators for such access under a conventional 5th Amendment "taking" analysis. Similarly, ensure that any changes to the "fair use" doctrine will not erode the property interests of database owners and operators.

(3) Even if private databases become more clearly protected as works of authorship under U.S. copyright laws, to protect the privacy rights inherent in those works, the Administration should also introduce and support separate federal legislation, modeled on existing bank and medical record privacy statutes, to ensure those databases will not be used for any regulatory or investigative purposes except upon issuance of a grand jury subpoena or, in exigent circumstances, a lawful search warrant. In addition, review and, if needed, amend other laws and regulations such as the Freedom of Information Act to ensure that information extracted lawfully from such databases must be treated as confidential information even if lawfully obtained by federal agencies.

Thank you for allowing us the opportunity to present these comments. We hope they will lead you and your colleagues to develop a more comprehensive and more inclusive policy for the National Information Infrastructure that will also benefit American agriculture. The Farm Bureau stands ready to offer its assistance to this Working Group in its ongoing review and deliberations.

PREPARED STATEMENT OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.

March 19, 1996.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: On behalf of the Association of National Advertisers, Inc. (ANA), I am writing to express our concern about two issues regarding the protection of intellectual property rights under the National Information Infrastructure (NII). The first is the serious problem of Internet domain name piracy, whereby third parties are registering the well-known names and trademarks of major national companies. The second issue is the problem of inappropriate alteration of copyrighted materials on the NII by third parties.

We commend you for introducing S. 1284, the "NII Copyright Protection Act of 1995," and for scheduling hearings on this important measure. While the issues addressed by this legislation are certainly very important, we would urge the Committee to also focus on the very important trademark issues that have been raised through the ongoing development of the NII. As the bill proceeds to markup, we strongly urge you to provide adequate protection for trademark rights on the NII. We request that these comments be included in the official hearing record of this legislation.

ANA'S INTEREST IN THESE ISSUES IS SUBSTANTIAL

The Association of National Advertisers, Inc. (ANA) is the industry's oldest trade association and the only organization exclusively dedicated to serving the interests of corporations that advertise regionally and nationally. The Association's membership is a cross-section of American industry, consisting of manufacturers, retailers

and service providers. Representing more than 5,300 separate advertising entities, these member companies market a kaleidoscopic array of products and services to consumers and other businesses. Everyone of our members have very major copyright and trademark interests in the marketing messages they produce to the public.

THE ROLE OF ADVERTISING ON THE NII

A number of ANA members are actively engaged in a variety of online marketing activities. While the Internet is still not a major selling vehicle for national advertisers, the advertiser's role is growing. It has been estimated that advertisers spent $44 million on advertising on the World Wide Web in 1995. An additional $12 million was spent for ads on commercial online services. While these numbers are very small compared to the more than $60 billion spent on national television and print media, growth projections for Internet advertising are impressive. A major consulting firm recently projected that online ad spending will reach $343 million this year, and that it will top $1 billion in 1997 and reach the $5 billion mark by the year 2000. Clearly, advertising is on the Internet to stay and holds the promise of being a significant source of funding for new media systems and content.

The NII presents tremendous benefits for both advertisers and consumers. At relatively little cost, companies can have instant access to the global economy, yet also maintain the flexibility to target consumers individually. Interactive media will increase consumer sovereignty and control over the advertising, entertainment and educational information they receive. Consumers will be able to get more of what they want and avoid what they don't want.

However, the "frontier" environment which currently pervades the world of cyberspace exposes companies to a tremendous risk of piracy and other unauthorized use of their valuable assets. More and more companies are finding that it is easy for others to break intellectual property law on the Internet and difficult for the companies to enforce the laws. Unless the various intellectual property interests of national and international companies are fully protected, the NII will never reach its full potential. We believe it is essential that the Congress update the various intellectual property laws to ensure that these valuable property interests are fully protected in the new world of cyberspace.

DOMAIN NAME PIRACY IS A SERIOUS PROBLEM

The problem of domain name piracy was discussed in Intellectual Property and the National Information Infrastructure; The Report of the Working Group on Intellectual Property Rights; September 1995 (hereinafter cited as "the White Paper"). The Task Force described several cases where trademark owners suddenly discovered that third parties had registered Internet domain names that are identical to their trademarks. For example, a former employee of the MTV Cable network had registered an Internet domain name of "mtv.com." A lawsuit by the network challenging the individual with trademark infringement and unfair competition is pending in the courts.

In another widely reported case, Princeton Review, Inc., a marketer of courses and materials to prepare students for standardized tests, had registered an Internet domain name ("kaplan.com") of one of its major competitors, the Kaplan Educational Centers. According to press accounts, officials of Princeton Review even publicly acknowledged that they had registered the "kaplan.com" domain name to mock and annoy their major competitor. An arbitration panel ruled in 1994 that Princeton had no legal right to use the "kaplan.com" domain name and ordered that Princeton relinquish the site name of Kaplan.

The "White Paper" provides an excellent description of the process that is followed when a company or individual seeks access to the full range of Internet products and services: "To send and receive information on the Internet, various organizations connected to the Internet must register their domains, networks and autonomous systems numbers with Network Solutions, part of the Internet National Information Center (InterNIC). The InterNIC performs this function under a cooperative agreement with the National Science Foundation. Within the context of a prescribed format, the Internet user may register any domain name as long as the identical domain name has not been previously registered with the InterNIC by another party. According to the InterNIC, there is no state or Federal statutory authority under which the InterNIC performs this registration function. The InterNIC does not conduct an examination of trademark or other records before registering a domain name." "White Paper" at 172–173.

The primary self-regulatory body of the business community, the Council of Better Business Bureaus, faced the problem of domain name piracy. When that group

sought to establish a website to provide information on a variety of consumer protection issues, they learned that the domain name of "bbb.org" had been registered by another individual. The CBBB eventually obtained ownership of the site name through litigation.

A number of major national advertisers have also experienced the problem of domain name piracy. As they attempted to register their corporate name, or the name of specific branded products they manufacture, they were informed by InterNIC that those domain names had already been registered by some third party. In some cases, the third party was a business competitor. In some cases, the third party was a satisfied customer of the company who simply wanted to converse with other satisfied customers over the Internet. Some third parties are unhappy customers who saw an opportunity for mischief, or simply "entrepreneurs" who saw a chance to make some money by selling an Internet domain name to the trademark owner.

Whatever the identity or motive of the third party, in each case, they have violated the intellectual property rights of the trademark owner. Trademarks are extremely valuable corporate assets. Companies spend many millions of dollars building consumer identification and loyalty through trademarks and brand names. The owner of a trademark is entitled to the exclusive use of that mark and to prevent unauthorized third parties from using the trademark or a confusingly similar mark. Any inappropriate use of the mark, whether malicious or innocent, can seriously dilute the value of the trademark.

As S. 1284 proceeds to markup in the Committee, we strongly urge you to amend the bill to specifically make clear that trademarks are fully protected on the NII.

COPYRIGHTED MATERIAL AND TRADEMARKS ARE AT RISK ON THE NII

We are also concerned about inappropriate alteration or use of trademarks and copyrighted material by third parties. At the present time, there is essentially no effective security for intellectual property rights on the Internet. Copyrighted and trademarked material which is provided by companies can be accessed by anyone and indiscriminately downloaded. Once downloaded, those materials can be manipulated and altered in ways very damaging to the property owner, and with the click of a few keys, made available to millions around the world.

According to Advertising Age, a major toy manufacturer recently discovered that Urban Desires, a sexually oriented Web magazine (http://desires.com), contained altered, inappropriate pictures of the image and trademark of one of its most popular toys. Entertainment companies have discovered that pirated, altered copies of their cartoons, games and videos are available in various forms online.

Since online advertising messages themselves can be easily manipulated, companies face a serious risk that their advertising could be altered and retransmitted to deceive potential consumers. For example, several national advertisers have discovered that without their consent or knowledge, their corporate logo has been placed on a third party's web site to indicate "support" for the activities and information available at that site.

As a result of these serious problems, companies are working much more proactively to protect their intellectual property interests. They are placing trademark and copyright information in all of their online materials. They routinely "surf" the Internet to be certain that others are not improperly using their trademarks, trade names or logos. They are taking direct action against violators, through litigation when necessary.

Private industry is also working to develop various technologies to more fully protect their copyright interests. These technologies include digital signatures, encryption and various access controls. We strongly support Section 4 of S. 1284, which imposes civil and criminal penalties for those who attempt to circumvent such copyright protection systems.

Finally, it is important to note that intellectual property rights must be adequately protected at the international level, as well as the national level. The NII has already become the Global Information Infrastructure and companies face similar piracy risks at the international level. A company which has registered its trade name with InterNIC may nevertheless find that its domain name has been registered in another country by a foreign pirate. For that reason, we believe that Congress should develop mechanisms to work with international bodies, such as the World Intellectual Property Organization, to provide solutions to these growing problems.

CONCLUSION

As the Information Infrastructure Task Force concluded last year: "unless the framework for legitimate commerce is preserved and adequate protection for copy-

righted works is ensured, the vast communications network will not reach its full potential as a true, global marketplace. Copyright protection is not an obstacle in the way of the success of the NII; it is an essential component." "White Paper" at page 16.

We appreciate the opportunity to provide these comments. As S. 1284 proceeds to markup in the Judiciary Committee, we urge you to provide full protection for both copyright and trademark interests on the NII.

The development of the NII and the GII is of critical interest to ANA and all of our member companies. In 1994, we joined with our sister association, the American Association of Advertising Agencies (AAAA), to form CASIE, the Coalition for Advertising Supported Information and Entertainment. The goal of CASIE is to create an environment where consumers have the broadest possible array of high-quality media options at the lowest possible cost. We believe that advertising revenue must continue to be a key funding source for information and entertainment in the evolving world of media.

We would appreciate the opportunity to work with you and other members of the Congress to craft legislation which will enable the NII and the GII to develop to their fullest potential, while protecting the intellectual property rights of companies that conduct business in cyberspace.

Thank you for your consideration of our views.

Sincerely,

DANIEL L. JAFFE.

PREPARED STATEMENT OF BROADCAST MUSIC, INC.

I. INTRODUCTION

Broadcast Music, Inc. ("BMI") is a music performing rights licensing organization. It represents over 3 million musical works created and owned by more than 180,000 affiliated songwriters, composers and publishers, as well as thousands of creators and copyright owners from countries all around the world.

BMI supports the overall thrust of the changes proposed by (S. 1284). BMI in particular supports the proposed addition to § 106(3) to add the words "or by transmission". We understand that this proposal is intended to clarify the distribution right of copyright owners to ensure that it includes digital transmissions of copies of their works. However, to clarify the law on this point further the proposed legislation seeks to amend the definition of "Transmit" to add the following sentence: "To 'transmit' a reproduction is to distribute it by any device or process whereby a copy of (sic) phonorecord of the work is fixed beyond the place from which it was sent." As a major part of the definition of public performance depends on and incorporates the definition of "transmit," BMI is concerned that the addition of this new language to the definition of transmit could potentially confuse the courts and have negative implications for licensing as well as liability.

Specifically, if a transmission qualifies as a distribution of a reproduction within the meaning of the proposed second sentence of the definition of transmit, does that mean it is no longer a public performance under the existing first sentence of the definition? We do not believe that the drafters of the bill intended this result. Accordingly, in order to clarify this potential misinterpretation we believe that language should be added to the statute specifically to clarify and ensure that digital transmissions of musical works remain public performances under the Copyright Act, regardless of whether they are also distributions of reproductions. There is simply no reason why the existing public performing right should be diminished in order to clarify the distribution right.[1]

In BMI's view, if a right of distribution by transmission is to be created, it should be defined and treated as additional to the right of public performance where sung or played renditions of musical works (i.e., not sheet music—whose only function is to convey an aural experience—are digitally transmitted to the public. This interpretation would be consistent with the "bundle of rights" philosophy of the 1976 Act, under which various exclusive rights are often implicated by a single activity. In-

[1] Representatives of the Patent and Trademark Office have assured BMI that it is not the intent of the White Paper to narrow the existing public performance right. Furthermore, although the White Paper contains statements that transmissions that are not heard in real time (i.e., simultaneously with their transmission) are to be considered distributions, not public performances (e.g. White Paper at pp. 71 and 214 n.536), PTO representatives have assured us that this language in the White Paper was not intended to eliminate the right of public performance for the compressed digital transmission of a radio or television program which could be heard or seen at a later time.

deed the White Paper itself recognized that the exclusive reproduction right would also be implicated by certain digital distributions by transmission at the point of receipt by a recipient's computer, thereby implicating a third right. White Paper at 215.

It should not be Congress's intent, to diminish the scope of the public performance right as it currently applies to compressed digital transmissions. We set out below our analysis of why digital transmissions of played or sung music are already protected by the existing U.S. right of public performance and under the Berne Convention.

II. LEGAL ANALYSIS OF THE NII COPYRIGHT PROTECTION ACT OF 1995 AND THE PUBLIC PERFORMING RIGHT

A. The Copyright Act currently protects transmissions of musical works as public performances

The right of public performance of musical works is created by 17 U.S.C. § 106(4) (1992), which reads as follows:

"Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

"* * * (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly * * *"

The Copyright Act states that "[t]o perform * * * a work 'publicly' means—"

"(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

"(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

17 U.S.C. § 101 (definition of "perform publicly"). And, although the Act does not define "performance," it does say that

"To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."

Id. (definition of "perform"). Finally, the statute says that a "device", "machine", or "process" is one now known or later developed.

The right of public performance of a copyrighted work is one of the six exclusive rights granted by the Act. The rights are those of reproduction, adaptation, distribution, display and public performance of a sound recording by digital transmission. 17 U.S.C. § 106(1)–(6). These rights exist concurrently with and independently of one another; they are not mutually exclusive. Rather, "[t]hese exclusive rights, which comprise the so-called 'bundle of rights' that is a copyright, are cumulative and may overlap in some cases." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5674. Thus, although downloading of digitally transmitted music onto DAT or CD or, for that matter, the reproduction in any tangible medium of any transmitted music is considered copying under the Act, the initial transmission of the musical work, so long as it meets the statutory requirements, is nonetheless a public performance.

Clause (2) of the definition of "perform publicly" above, is the "transmit" clause. This is the section most relevant to the analysis regarding digital transmission of musical works in the context of the NII. In order for the performance right to be invoked, a musical work must be "transmitted" and that transmission must be "to the public" within the meaning of the Act.

The current statute states that to "'transmit' a performance * * * is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C. § 101 (definition of "transmit"). Until the recent enactment of the Digital Performance Right in Sound Recordings Act of 1995 ("the 1995 Act"), the Act did not mention digital or other computer technology by name when discussing transmitted public performances. However, the 1976 Act on its face and in legislative history clearly covered digital transmissions as public performances. Most significantly, the Act expressly stated that the "devices" and "processes" by which a performance can be "transmitted" within the meaning of the Act include those "now known or later developed." *Id.* The novelty of digital transmissions or of the NII itself is thus irrelevant to the statutory analysis.

In crafting the 1976 Act Congress—acting through this Subcommittee—was aware of the rapid onset of new technologies, such as the computer, that would affect copyright. Congress decided to draft the performing right broadly rather than try to legislate specifically for every possibility. Congress took this broad approach to technology in drafting its definition of "transmit." The House Report stated that the devices by which a public performance could be transmitted could include "any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented." H.R. Rep. No. 1476, 94th Cong. 2d Sess. 63 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5677. The legislative history bears out that transmission of a musical work by means of new technology is clearly a transmission within the meaning of the Act.

Under the existing 1976 Act the fact that transmissions of a sung or played musical work will not be heard simultaneously does not mean that they are not public performances. Digital transmissions, whether audible or viewable in "real time" or only after being downloaded, are functionally equivalent to current satellite and terrestrial broadcasting and cable transmissions. It is self-evident that a radio or television broadcast is available to a substantial number of people and thus "public." And the legislative history of the 1976 Act so states. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 64 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5678. Congress stated with equal clarity that a transmission is also considered public "whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service." *Id.* at 5678. Once the transmission is available to the public, there is no requirement that it, in fact, be heard by an audience:

"[A] performance made available by transmission to the public at large is 'public' even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients of the transmission was operating his receiving apparatus at the time of the transmission." *Id.*

Besides allowing audiences of publicly transmitted performances to be geographically dispersed, the Copyright Act also allows the audience to be "chronologically dispersed." *2 Nimmer* § 8.14[C] at 8–174. The Act states that recipients of a publicly transmitted performance may receive the performance "at the same time or at different times." 17 U.S.C. § 101 (definition of "publicly"). Thus, there is no requirement that more than one person listens to, or even be able to listen to, the performed work simultaneously with its performance.

Nevertheless it has been argued that the sending of a digitized form of a work does not constitute the "play[ing]" or "rendering" of the work referred to in the statutory definition of "perform"[2] until and unless the digital information is reconverted into sounds or images that are audible or visible. If a digital transmission is not made audible at a listener's home until after it is received, electronically stored, and then called for by the listener, the subsequent playing of a song ("performance") would be private and not the public performance that would be involved if the original transmission were made audible at the time of transmission.

The flaw in this argument is that if it applied to digital transmissions it could equally apply to the analog radio and television broadcasts which were so clearly meant to be covered by the exclusive right to perform publicly. After all, standard radio broadcasts are also not audible by the human ear until the radio waves received by the antenna are reconverted by the radio receiving set. Moreover, conventional analog radio equipment is fully capable of receiving radio signals and recording them on tape even if the loudspeakers attached to the radio receiver are not turned on and no one is at home listening. Home taping of conventional television and radio signals is, of course, a widespread practice. The fact that on-demand transmissions might be downloaded or otherwise reconverted into audible sound at a time after the transmission has occurred would seem to be completely disposed of by the statutory statement that a transmitted performance remains "public" even if it is received "at different times" by each member of the public. 17 U.S.C. § 101. Moreover the legislative history seems to make it clear that a transmission is complete once it is sent, so long as it is capable of audible reception by the public.

The more precise statutory answer to this line of argument rests upon the intentionally broad formulation "by means of any device or process" contained in Section 101's definitions of "publicly" and "transmit". So long as the transmission is sent in such a way as to be eventually audible by the public, any combination of intermediate technological steps is meant to be of no account. Indeed, the statutory history clearly supports the proposition that a transmitted performance need not be initially audible, as a transmission may reach the public in "[an]y form" and qualify as a public performance. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 64 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5678.

B. The Digital Performance Right in Sound Recordings Act of 1995 provides that digital transmissions are public performances

The recent passage of the Digital Performance Right in Sound Recordings Act of 1995 (the "1995 Act") supports our view that digital transmissions of musical works do not have to be heard in "real time" in order to beconsidered public performances under the Copyright Act. The 1995 Act itself states that nothing in the amendments to Section 114 or 115 of the Copyright law is intended to derogate from the existing rights of the copyright owners of musical works under Section 106(4). 17 U.S.C. § 114(d)(1)(B) and § 115(c)(3)(H)(ii), (K) (1995).

Moreover, the legislative history also clearly supports our interpretation of pre-existing law under the 1976 Act. Senate Report No. 104–128 states that "(u)nder existing principles of copyright law, the transmission or other communication to the public of a musical work constitutes a public performance of that musical work." Senate Rep. No. 104–128, reprinted in 1995 U.S.C.C.A.N. (December 1995 Advance Sheets) 356, at 374.

The 1995 Act also clearly anticipates that interactive digital transmissions will be considered public performances. It states that licensors who have obtained permission from the copyright owner of the sound recording to publicly perform the sound recording in an interactive transmission are still required to obtain public performance rights from the copyright owner of the musical work prior to making interactive transmissions. 17 U.S.C. § 114(d)(3)(C).

The 1995 Act provides indications of those kinds of digital transmissions which will be considered "digital phonorecord deliveries" subject to mechanical compulsory licensing requirements under amended Section 115. The definition of "digital phonorecord delivery" expressly excludes real-time, noninteractive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible. 17 U.S.C. § 115(d). Thus, Congress saw fit to make clear that transmissions that are audible in real time without intermediary copying are public performances, but are not digital phonorecord deliveries.

The 1995 Act further specifies that regarding the establishment of appropriate licensing fees for digital phonorecord deliveries, a distinction must be made between "general" digital phonorecord deliveries and "incidental" digital phonorecord deliveries. The Senate Report describes an "incidental" digital phonorecord delivery as follows: A transmission results in an incidental digital phonorecord delivery if it is "designed to allow transmission recipients to hear sound recordings substantially at the time of transmission, but the sound recording was transmitted in a high-speed burst of data and stored in a computer memory for prompt playback (such storage being technically the making of a phonorecord), and the transmission recipient could not retain the phonorecord for playback on subsequent occasions (or for any other purpose)." 1995 U.S.C.C.A.N. at 386.

Congress clearly anticipated that there would be "means, devices or processes" for publicly performing musical works by digital transmission that require intermediary copying as a technical necessity. In view of this, downloaded digital transmissions, or other compressed transmissions that are by definition transmissions which fall under the rubric of the public performance right may also be distributions of reproductions within the meaning of the 1995 Act.

This is especially so where the transmission is "designed to allow transmission recipients to hear sound recordings substantially at the time of transmission, but the sound recording was [for technical reasons] transmitted in a high-speed burst of data * * * ." *Id.* The 1995 Act clearly states that a digital transmission can constitute a digital phonorecord delivery "regardless of whether the digital transmission is also a public performance * * * of any musical work * * *" 17 U.S.C. § 115(d).

C. Existing case law supports our interpretation of the act

Although no cases have specifically dealt with whether on-demand, digitally transmitted music is a transmission within the meaning of the Act as it stands, the courts have been faithful to the legislative intent that the "transmit" clause of the definition of "publicly" in the Act be interpreted broadly. "A defendant * * * is not immune from liability for copyright infringement simply because the technologies are of recent origin or are being applied to innovative uses." *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F.2d 154, 157 (3d Cir. 1984) (holding that defendants' exhibition of videocassettes in a private viewing booth constitutes public performance). The Southern District of New York similarly held that "in recognition of rapid technological developments in the copyright area, courts have interpreted the Copyright Act flexibly to reduce the need for frequent Congressional amend-

ments." *David* v. *Showtime/The Movie Channel, Inc.* 697 F. Supp. 752, 759 (S.D.N.Y. 1988).

In *Playboy Enterprises, Inc.* v. *Frena,* 839 F. Supp. 1552, 1557 (M.D. Fla. 1993), the defendant's computer bulletin board service allowed its customers to upload and download digital copies of copyrighted photographs by means of digital transmissions by the customers' computers and modems. The court found infringement of the plaintiff's right of public display of its photographs. The public display right accorded to copyright owners of visual art is parallel to the public performing right accorded to holders of copyright in musical works. *See* 17 U.S.C. § 106(5).

The court followed the clear legislative intent to apply the Act's "transmit" clause to new technology and held that the Act "precludes unauthorized transmission of the display from one place to another, for example, by a computer system." *Frena* at 1557. We believe the *Frena* decision supports a finding that a downloaded, compressed transmission constitutes a public performance of a sung or played musical work notwithstanding the fact that the work is not audible or viewable until after the recipient of the transmission receives it.

There are other examples of transmissions that are not audible or viewable but are nevertheless public performances. For example, although specifically exempted by § 111 of the Act from liability for copyright infringement, a passive secondary carrier performs publicly when it picks up a television transmission from an initial transmitter (such as a superstation) and in turn transmits the signal to a cable system that then transmits directly to the public. And this is so despite the fact that the secondary transmission signal never becomes audible or visible to any listener or viewer at all. The performance is not seen or heard until the cable operator transmits it a third time to its selected paying customers. Indeed, the statutory exemption for passive secondary carriers would not be necessary if the inaudibility of their transmissions meant they were not publicly performing. *WGN Continental Broadcasting Co.* v. *United Video, Inc.,* 693 F. 2d 622, 625 (7th Cir. 1982); see also *Hubbard Broadcasting, Inc.* v. *Southern Satellite Systems, Inc.,* 593 F. Supp. 808, 813 (D. Minn. 1984) (stating that "under the broad definitions found in § 101 of the Copyright Act, a transmission is a public performance whether the transmitter originates, concludes, or simply carries the signal"), *aff'd,* 777 F.2d 393 (8th Cir. 1985), *cert. denied,* 479 U.S. 1005 (1986).

The court in *Hubbard* understood and upheld this principle by specifically refusing to excuse from copyright liability an intermediate carrier of a television signal. 593 F. Supp. at 813. Although the defendant intermediate carrier picked up an inaudible television signal and retransmitted it to another carrier without the defendant's intermediate transmission ever being made audible, the court deemed the transmission to be a public performance and thus susceptible to copyright laws covering public performance. *Id.* See also *David* v. *Showtime/The Movie Channel, Inc.,* 697 F. Supp. 752 (S.D.N.Y. 1988) (holding that cable programmers had publicly performed musical works by transmitting them to cable systems, even though those transmissions were not seen or heard until they were retransmitted to cable system subscribers).

Under this reasoning, the time at which digitally transmitted music becomes audible is of no relevance to an inquiry into whether that transmission is a public performance. Because the downloaded or compressed digital transmissions we have hypothesized, whether conveyed by radio waves or wire, would be transmissions within the meaning of the Act, and because they would be available to the public, they are public performances as intended by the Act.

Clearly, the Act, its history, and relevant case law all overwhelmingly support the inclusion of digital transmissions within the Act's definition of "transmission," and hence "performance."

D. NII transmissions and the Berne Convention

Article 11 of the Berne Convention for the Protection of Literary and Artistic Works provides that "authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

"(1) the public performance of their works, including such public performance by any means or process;

"(2) any communication to the public of the performance of their works." (emphasis added)

The Guide to the Berne Convention indicates that the broad language in Article 11 covers performances by all means of recording (discs, cassettes, tapes, videogames, and so forth) and there is no reason to believe that it would not cover NII transmissions, since all public communications other than broadcasting are covered.

If the new distribution by transmission right does not expressly co-exist with the public performing right, the NII legislation may undercut or violate Article 11. Con-

gress should take a firm position that the domestic legislation it recommends would not conflict with Berne standards. Furthermore, since the Agreement on Trade-Related Aspects of Intellectual Property under the General Agreement on Tariffs and Trade, recently incorporated the standards of the Berne Convention, this is an issue of major importance to international trade.

If the proposed amendment to the definition of "transmit" does indeed conflict with our Berne responsibilities, this is another compelling reason the Congress should clarify this legislation. The problems that would arise from (1) a Berne violation, (2) attendant claims by foreign countries that they not provide Americans with national treatment, and (3) GATT TRIPs negotiation difficulties would be substantial indeed.

Respectfully submitted,

MARVIN L. BERENSON,
Senior Vice President & General Counsel,
Broadcast Music, Inc.

PREPARED STATEMENT OF THE CONFERENCE ON COLLEGE COMPOSITION AND COMMUNICATION; CAUCUS ON INTELLECTUAL PROPERTY

November 13, 1995.

Hon. ORRIN G. HATCH,
Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: As concerned members of the Caucus On Intellectual Property and Composition Studies (a caucus of the Conference on College Composition and Communication), we are writing to communicate our views about S. 1284, the NII Copyright Protection Act of 1995, as outlined in the Working Group Report on Intellectual Property Rights (the "White Paper"). While we agree that some type of intellectual property legislation for digital information is desirable, the proposed legislation is hostile to the interests of writing teachers and students. In fact, in its current form the legislation would do serious harm to our efforts to teach students how to write. We respectfully request that your Committee hold comprehensive hearings on S. 1284 with the aim of thoroughly scrutinizing the full range of implications of the bill and of making appropriate amendments to ensure that the bill supports a fair and just copyright policy we can all live with.

The group of teachers we represent is a large one. The Conference on College Composition and Communication (CCCC) is a subgroup of the National Council of Teachers of English (NCTE). CCCC represents approximately 10,000 teachers and administrators of college-level writing. Our membership is large, but our pedagogical influence is even more vast. Since nearly every college and university student in the United States takes one or more college composition courses, CCCC members are responsible in some way for teaching something on the order of one million students each year. The Caucus on Intellectual Property and Composition Studies exists to inform CCCC members about developments in intellectual property policy which impact our instructional practices, and also to inform public policy makers of how such developments impact our teaching efforts.

The electronic network has become an important means of teaching writing in the U.S., and writing teachers view the network as having the potential to promote a higher level of professional and public literacy on the part of citizens. The Internet and World Wide Web provide an incredibly rich source of information for students and teachers—and not just a passive resource, but a live, interactive one. Students browse electronic resources to conduct research, but they are also joining electronic conferences and discussing issues with students and faculty at other institutions and even with professionals in government, business, and industry. Students are actually publishing their work on the network. The network has thus allowed teachers to open the doors of their writing classrooms, encouraging students to enter the public arena as writers and to become more involved in public and professional issues, and to break down the traditional barriers that have sometimes isolated academe from government, business, and industry.

By not taking into account these valuable uses of electronic media as tools for teaching (and doing) writing, S. 1284 threatens the gains that writing teachers have made. We have three specific objections:

1. S. 1284 is more than simply a "minor" adjustment of Title 17 U.S.C. to apply to digital information. S. 1284 represents a general tightening of copyright restrictions. It enforces an even more restrictive standard on digital materials than currently applies to print materials, which will result in an increased level of intrusion

into people's use of digital information. If passed in its current form, the legislation would effectively destroy the gains teachers have made in designing and using the Internet and World Wide Web (for instance) as educational resources. The legislation is an attempt to restrict to the point of near elimination any sense of educational Fair Use as it might apply to computer-generated materials. It also fails to take into account the unique communicative uses of these new media by writers, authors, and electronic publishers.

2. Despite the claims in the Introduction of the White Paper that the Working Group sought broad public input into the White Paper and the legislation it proposes, input from the CCCC and NCTE was not solicited nor obtained. Writing teachers' views were never considered. There is no accommodation of the special circumstances of writing teachers or of educators generally. The philosophy undergirding the legislation serves the commercial interests of larger publishers, recording companies, and major motion picture producers at the expense of educational interests as well as the general public interest of the right of access to information.

3. If enacted, S. 1284 would have troubling implications for writing instruction. We cite three examples:

(a) The legislation would discourage the common research practice of "browsing" World Wide Web, since such browsing would, under S. 1284, constitute reproducing a copy. Thus, although students would continue to be allowed to browse print resources in a library, they could not safely browse materials on the Internet without risking copyright violation.

(b) The legislation would make universities, as service providers, liable for students' copyright infringements. Rather than face the level of liability this entails, universities will severely limit teachers' uses of Internet resources. The legislation would thus discourage the growth of new electronic educational innovations and encourage increased invasion of privacy by service providers (who, to protect themselves, will be required to increase monitoring of students and library patrons).

(c) This legislation would limit the kinds of writing that will occur on computer networks. It will have a chilling effect on interactive hypertext designs and will discourage the interactive uses of the Internet that are currently being developed. If service providers are liable for infringing activity (even if they were not aware of it and didn't intend it), interactive, contributory forms of network activity will be viewed as too risky. The World Wide Web will become a passive commercial show (like television), instead of an interactive educational resource—and the potential of the Web as an active writing instrument will be lost.

For these and other reasons, the NII Copyright Protection Act of 1995 as currently framed does not serve the public interest. We fail to see how the public interest will be served if students are not allowed to browse digital materials, or if universities are required to do more snooping and to allot additional resources to support network use, or if this legislation has the effect of transforming the Internet into another version of the Home Shopping Channel and thus of discouraging student writing.

In its current form, S. 1284 would certainly have a detrimental effect on the efforts of writing teachers and students. As administrative representatives of the Caucus on Intellectual Property and Composition Studies, we strongly request that your Committee support comprehensive hearings and review of this legislation, seeking broad public debate and soliciting the views of educators before acting on it. We would welcome the opportunity to present our views before your Committee during its important deliberations on H.R. 2441.

Respectfully,

ANDREA A. LUNSFORD, and 155 others.

PREPARED STATEMENT OF THE ELECTRONIC MESSAGING ASSOCIATION

The Electronic Messaging Association (EMA) submits this statement on behalf of its members, in order to ensure that the concerns of the hundreds of thousands of businesses nationwide that use electronic messaging in their business operations are considered in any legislation addressing copyright liability for material in digital form. EMA consists of over 500 corporate members who are both users and providers of electronic messaging and electronic commerce products and services. User members reflect the proliferation of electronic messaging into such diverse industries as petroleum, finance, health care, and aerospace. Provider members are involved in all phases of the technology, including software development, computer manufacturing, local area network (LAN) messaging products, and global public and private network services.

EMA provides this testimony to emphasize the tremendous, and tremendously growing, role of digital communications in business and to ensure that the concerns of businesses are addressed in any legislation addressing copyright in the digital arena. The size and rate of growth of digital communications among businesses is truly astonishing. In 1994, 23 million Americans communicated by electronic messaging in the workplace. In 1996, the number of Americans employing electronic messaging in the workplace will reach 38 million. By the year 2000, this number is projected to reach 72 million.[1] Everything from large interstate and multinational corporations to fledgling "mom and pop" operations use digital communications for business purposes, and few such companies have in-house copyright lawyers.

As both users and providers of copyrighted material, EMA members support recognition of copyrighted materials in digital form and clarification of the law in this area. Nevertheless, we are concerned that due to the unique characteristics of interactive computer systems and services, S. 1284 as introduced would expand copyright protection beyond its current bounds in ways that could hold innocent users or operators of interactive computer systems liable for actions over which they have no control. EMA has cosigned and supports the testimony submitted by the Interactive Services Association (ISA), which details some of the unwarranted potential liabilities under S. 1284 as introduced.

Such unwarranted liability extends beyond on-line service providers to encompass every business or organization in America that includes a linked interactive computer system. As drafted, S. 1284 may leave companies liable anytime an employee accesses infringing materials with a company-owned terminal (whether or not the employee knows the material is infringing). Such liability may extend to where an employee accesses the infringing material via the company system from the employee's own home.

Indeed, Congressional offices may be vulnerable as well.[2] For example, material sent by constituents or others to a Congressional office e-mail system and forwarded to a particular staffer may create liability. Indeed, given the overly broad use of the term "transmission" in S. 1284, the mere access of such material by a linked Congressional staffer may create liability. We urge Congress in considering this legislation and the variants being negotiated in the other body to gauge the reasonableness and balance of the legislation by considering the liability and the requirements it could impose on their own offices that are connected to the Internet.

From our perspective as users of digitally linked networks, we offer the following observations on S. 1284:

First, liability should not attach for mere "transmission" of material. Due to the nature of interactive computer systems, the simple act of accessing material inherently entails "transmission" of the material. To equate this action with copyright infringement expands the scope of action which triggers infringement from the current requirement of distribution to include mere access. This is similar to holding someone liable for copyright infringement for merely opening up a book in a bookstore.

Second, companies should not be held liable for the actions of their employees or agents where the actions were outside the scope of employment or agency. For example, companies should not be held liable for the actions of a rogue employee misusing company systems.

Third, the sheer volume of users and digital transmission—half a billion electronic messages are estimated to be sent daily—makes universal monitoring impossible. Digital copyright legislation must not require system operators and service providers to police or monitor transmissions.

Finally, as explained above, the concerns of independent businesses and organizations which use interactive computer networks, many of which are small operations, must be taken into account in drafting legislation. Thus, proposals which may be proper for large on-line service providers, such as requiring registration of an agent with the Copyright Office to field copyright violation complaints, may not be practical for hundreds of thousands of independent businesses, or for the Copyright Office itself.

EMA supports measures to ensure that enforcement of copyright is practical, reasonable, and fairly shared between copyright owners and users. Thus, EMA supports clarification that copyright protection extends to digital copies, and provisions that will implement such protection in a practical, reasonable, and fair manner, such as a mandatory notification and "take down" requirement, and exemption of corporate liability for mere provision of conduit services. Essential to such a regime,

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[1] Source of data: Study commissioned by EMA from Wilkofsky/Gruen & Associates.

[2] Congress has subjected itself to copyright liability. 28 U.S.C. § 1498(b) (providing a cause of action in the Federal Claims Court for copyright infringement by the United States).

however, is protection against liability for companies for actions of employees or agents outside the scope of their employment or agency.

We thank the Committee for the opportunity to provide these remarks and look forward to working with it in fashioning fair, reasonable, and balanced legislation in this field.

PREPARED STATEMENT OF THE HOME RECORDING RIGHTS COALITION AND THE CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION

Chairman Hatch and Members of the Committee:

Given the extensive discussion of proposed Section 1201, the Home Recording Rights Coalition (HRRC) and the Consumer Electronics Manufacturers Association (CEMA) are providing this joint statement for inclusion in the hearing record.

CEMA is a sector of the Electronic Industries Association (EIA). EIA includes in its membership the leading manufacturers of electronics origination, transmission, interface, and display devices. CEMA represents manufacturers of television and stereo receivers, video and audio recorders and players, personal computers, multimedia devices, and hundreds of other consumer electronics products. Our members represent about 250,000 U.S. manufacturing jobs and about $64 billion in annual sales. As the trade association for the consumer electronics industry, CEMA is critically interested in the potential consequences of S. 1284 for manufacturers, sellers, and users of these products.

The HRRC was formed in 1981, after the U.S. Court of Appeals for the Ninth Circuit issued a ruling in the Sony Betamax litigation—later reversed by the Supreme Court—that would have restricted consumers' fair use rights to record at home and could have prohibited the sales of VCRs to consumers. HRRC includes consumer electronics manufacturers and retailers, consumer organizations, service associations, and others interested in the personal, non-profit use of consumer electronics recording equipment.

HRRC, since its inception, has expressed concern over any legislation that would restrict the rights of consumers to make recordings at home for private, noncommercial purposes. We have evaluated such legislation by asking three simple questions: does it advance technology and consumer access to new technologies? Will it clarify or muddy legal interpretation of consumers' rights? And, most important, does it consider the customary and reasonable recoding, viewing and listening practices of law-abiding citizens and their families?

Because S. 1284 does not come close to passing these tests, we oppose it in its present form. We generally join in the criticisms that have been expressed by other witnesses over this bill's implications for restricting consumers' ability to make lawful fair use of copyrighted materials. In particular, we share the Digital Future Coalition's view that, in amending current law, Congress should ensure that cyberspace copyright law balance the interests of copyright holders and users of copyrighted materials. From our specific perspective of caring about technical progress, legal clarity, and fairness to consumers with respect to home recording, however, we are particularly concerned about the implications of Section 1201—the so-called "circumvention" provision.

At the outset, we want to emphasize that we do not automatically oppose legislation just because it limits consumer home recording in some way. In the 102nd Congress, we supported the enactment of the Audio Home Recording Act of 1992 (AHRA), which restricted the use of digital audio recorders, but in a balanced fashion also provided an exemption from copyright suit for certain recorders and consumer recording practices. In the same Congress we also opposed the so-called "Motion Picture Antipiracy Act," on which Section 1201 of S. 1284 seems very closely modeled. We argued that this legislation was unduly broad, lacked any recognition of fair use, and would create technical and legal uncertainty, rather than certainty. We were pleased that it never got past the hearing stage.

Unfortunately, we have the same criticisms of Section 1201. We are fundamentally concerned over any legal restriction on "circumvention devices" that lacks any definition of, or even any reference to, a specific technical standard as to what anticopy technology must be adhered to as a matter of law.

Section 1201 would prevent the sale of any device or product or component incorporated into a device or product whose "primary purpose or effect" is to avoid or bypass any anticopy technology. As pointed out by Professor Robert L. Oakley on behalf of the DFC, Section 1201's adoption would reverse the Supreme Court's 1984 holdings in the Betamax case that consumers have a right to private, noncommercial home recording, and that it is legal for consumers to buy a recording product so long as it has any commercially significant non-infringing purpose. This holding

is the magna carta that has secured the right of consumers to buy VCRs. It created a market that has been beneficial for everyone.

The Administration's proposal cannot be easily fixed; its problem is generic—it purports to outlaw "circumvention" while not attempting to define that which is protected. This broad, non-specific approach makes it simply impossible to protect the rights of consumers to continue to make legal, fair use recordings at home for private, noncommercial purposes.

We supported the Audio Home Recording Act because it protected customary fair use rights by defining and limiting the circumstances in which encoding that restricted recording could be applied. It contained an express exemption from suit for conforming products, and it defined what a product had to do, or not do, to conform, through a technical standard against which compliance could be measured.

Before adopting the Audio Home Recording Act, this Committee and the Congress made sure that the technical coding systems to which digital recording devices would be required to respond would operate without degrading the quality of either transmissions or lawful copies. You assured yourselves that the design demands would be reasonable, and the manufacturing expense for compliance would be minimal. And, you inquired into the licensing status of the anticopy technology, so that those obliged to conform would not be at the mercy of those who control technology with which conformance is mandated. The Audio Home Recording Act assured compatibility with existing and future technologies, and compatibility among technologies that could be used to limit recording.

In contrast, Section 1201 of S. 1284 contains none of these attributes that promote legal certainty, technical progress, and fairness to consumers. As introduced, the bill proposes neither any specific and tested technology nor any limitation, to protect consumers, on its use. Instead, Section 1201 contains a one-sided and fundamentally ambiguous proscription: it simply bans any product or service whose "primary purpose or effect * * * is to avoid, bypass, remove, deactivate, or otherwise circumvent * * * any process, treatment, mechanism or system which prevents or inhibits the violation of any of the exclusive rights of a copyright owner * * *." As Soupy Sales used to say, "What do we mean by this?"

Does this apply only—as the White Paper suggests—to "black boxes" clearly designed to defeat particular copy protection signals? If so, it fails to define either what a "copy protection system" is or what a "black box" is, or when the use of such a device may be lawful and appropriate. So a "box" or even a circuit designed to enable fair use recording, clear up a noisy picture, or work with one type of copy protection could be banned if it fails to respond to all types of copy protection. If a consumer needs such a device to make fair use recordings, as defined by the Supreme Court, how can he or she lawfully obtain one?

Moreover, how can one distinguish between a circuit design in a "black box" and the identical circuit—or lack of a circuit—in a VCR or a computer? If the circuit in question is included in a consumer model VCR or computer, or if the VCR or computer lacks a circuitry necessary to comply with a particular anticopy encoding, is the whole VCR or computer now considered illegal? We see no reason to take away consumers' fair use rights now, when consumer interest in home recording and VCRs has been shown so clearly to have been of such enormous obvious benefit in spurring the production of motion pictures. The basic problem with S. 1284 is that it would outlaw the "circumvention" of something without defining what is to be protected. The result is a potential Catch-22 that would haunt any recording device, the retailers who would sell them, and the consumers who would buy them. We called this problem to the attention to the Administration, and it did respond, on page 232 of the White Paper, with the assurance that "[t]he proposed amendment would impose no requirement on manufacturers to accommodate any protection systems, such as those required in [the AHRA]." This apparently was included to provide some comfort, but two problems remain: First, this limitation—to the extent it would immunize certain manufacturers from suit for violation of this provision—does not appear in S. 1284. Second, even within the terms of the Administration White Paper, "manufacturer" is nowhere defined. No effort is made to draw the line between a maker of a "black box," which indeed must be manufactured, and the sort of computer accessory, VCR accessory, or VCR "manufacturer" to whom, presumably, the Administration was trying to give reassurance.

With due respect to the Administration, which has tried very hard to address the concerns we have raised, we believe there is only one workable approach to governing devices as to consumer recording practices:

Define the copy protection technology you wish to protect against circumvention, and assure that products implementing this technology, and the consumers who use it, will not face suit under the Copyright Act;

Make sure that the implementation of such technology is economical and does not harm program content, and that rights to it are available on reasonable terms to both device manufacturers and copyright proprietors;

Most importantly, define when and how copyright proprietors can and cannot use anticopy encoding, to protect the customary and reasonable fair use rights of consumers; and

Then, and only then, prohibit the circumvention of the copy prevention technology that passes these tests.

In the White Paper, the Administration recognized in note 568 that the approach I have outlined is the right approach for audiovisual recording devices. It encouraged the consumer electronics and motion picture industries to pursue it. As members of this Committee know, we have done so with mutual good faith and determination. Working with the Motion Picture Association of America, we have crafted a proposal that accomplishes our stated objectives while addressing the concerns of copyright owners. We hope to be able to soon make a legislative proposal that will enjoy the support of the recording industry and computer hardware and software industries as well.

In the meantime, with all respect we must say that Section 1201 is not the right approach, at least for consumer electronics devices that consumers use to record entertainment programming for private, noncommercial purposes. These devices have been a boon to consumers and have created, for the motion picture industry, the largest market it has ever known. To forget about protecting consumer rights, and to introduce uncertainty, ambiguity, and unintended consequences to this market through the application of this overly broad and unclear provision would be a mistake.

We remain committed to working with the Committee and with the Administration to bring our copyright laws into the digital era.

PREPARED STATEMENT OF HUGH MACKWORTH, CHIEF EXECUTIVE OFFICER, DIGIMARC CORPORATION

The Digimarc Corporation is pleased to have the opportunity to submit testimony regarding S. 1284. Digimarc is a young startup corporation committed to copyright protection. Digimarc's first products will be on the market shortly. Assuring the protection of intellectual property rights in the digital age will be critical to the rapid deployment of technology and to the availability of creative works to be carried by it. Reasonable modifications to current law, such as those included in S. 1284, will be needed if technologies such as Digimarc are to be fully successful in facilitating this information revolution.

The Digimarc technology embeds digital data within analog objects, such as photographic images, graphics, video, movies, or audio. The embedded information acts like an invisible signature and is very robust, surviving even the conversion to physical formats (such as printing/scanning.) This signature can contain information about the object itself, enabling a wide variety of applications; proving ownership, locating Web addresses, triggering digital-cash meters, tracking illegal distribution, or telling customers about the creator of a work.

Our prospective customers tell us that their biggest problem is inadvertent misuse. Digimarc signatures identify the true owner, a tool that disseminates information. Creators will have the power to protect their rights without having to prevent their content from being digitized. Key to the Digimarc technology is its ability to convey information in "public" or "private" codes. Public codes provide an open communication channel and allow reading, by any reader with decoding software, of rights information necessary to confirm copyright ownership or obtain rights through a clearinghouse. Private codes provide secure marking of an object which cannot be removed without authorization of the copyright holder and can be used as evidence in a copyright infringement action.

Digimarc has reviewed S. 1284 and would like to offer support for those provisions which would preserve the integrity of copyright management systems.

The purpose of embedding copyright management information into digital works is to ensure there is a clear understanding regarding the ownership and the terms and conditions of their use. This purpose can be achieved only if the information is accurate and widely believed to be accurate. A promising technology such as Digimarc will be most useful in "enabling" digital commerce if its integrity is protected and users can rely on it.

From a public policy perspective, a legislative provision which would preserve the integrity of copyright management information is essential to encourage the full uti-

lization of electronic transmission systems for the provision of content and to foster the growth of electronic commerce.

We support the intent behind section 1202 of S. 1284 as a means to preserve the integrity of copyright management information. It forbids the provision or distribution of false copyright management information. It prohibits any person from improperly removing or altering copyright management information, from distributing copyright management information that has been improperly altered, and from knowingly distributing copies or phonorecords from which copyright management information has been improperly removed. Copyright management information is defined to include the names of the author and copyright holder of a work, the terms and conditions for uses of such works, and other information that the Register of Copyrights may describe.

We also support the policy contained in section 1204 which provides criminal penalties for violating these provisions with intent to defraud.

The Digimarc technology is reliable, secure, and robust. It survives multiple generations of copying, modification, printing, scanning, and compression. Information that has been embedded using Digimarc technology cannot be removed or altered without having the noise sequence and the unique numerical code used to embed the information in the object. This noise sequence and user number together make up the only "key" that will unlock the information in the object if the private key method is being used.

Despite this technological security, legal protection's are important to Digimarc to guard against misuse by those who might have improperly obtained a person's Digimarc code and to protect the integrity of information contained in our public codes. A dual path of legal protection and technology is important to assure users of the information superhighway that their content is secure from tampering and misappropriation.

We have noted the debate on the companion measure in the House as regards the issue of infringement liability for on-line services. Digimarc might provide a partial technological answer to the problem of policing the use of these services. If a copyright owner of an image, or a soundset, were to mark the material with the Digimarc signature, it is possible that "filters" in an on-line service could detect that material as it is posted or sent. The advantage of the Digimarc technology is that it travels with the copyrighted object, even if the object has been scanned from a printed page. While our technology does not work for the printed word (and we can think of none that does, as printed words are very easily modified, or re-keyed, or stripped of file and header information), it does work for image and sound, and may be of value in this debate.

Prepared Statement of the National Association of Broadcasters

INTRODUCTION

The National Association of Broadcasters (NAB), a nonprofit incorporated association representing America's radio and television stations and broadcast networks, submits these comments on S. 1284, the "NII Copyright Protection Act of 1995." While broadcasters are sensitive to the digital, computer and technology related problems sought to be addressed by this legislation, NAB is concerned that several provisions, as drafted, could unnecessarily, and perhaps unintentionally, disrupt copyright practices that have governed the broadcast industry for many decades and, with respect to the library exemption, could create the risk of abusive copying.

First, the ambiguity created by Section 2's amendments to the distribution right, the definitions of transmission and publication, and the right to prohibit importation could expose broadcasters to liability for infringing the distribution and importation rights through broadcast transmission. While it is our understanding that the amendments contained in Section 2 were not intended to cover broadcast transmissions, (and, indeed, the White Paper's example of a distribution by transmission involved a computer program transmitted from one computer to ten others), the language should be revised to make this intent clear.

Second, the provisions of Section 3 allowing libraries, for the first time, to reproduce and maintain copies of works in digital form could, without further protections or limitations, create the possibility of facilitating massive on-line copying of broadcasters' works.

Third, the provisions concerning the circumvention of copyright protection systems in Section 4 needs to be modified to clarify that the prohibition against circumventing such systems would not apply to a party who defeated a copyright pro-

tection device for the purpose of using copyrighted material in an otherwise lawful manner.

Fourth, the copyright management information provisions of Section 4 create potential dilemmas for broadcasters and other using licensed copies of works, in that when CMI information contained in their copies becomes out of date, they are prohibited both from broadcasting such "false" information and from altering it.

NAB believes none of these problems in insurmountable, and most can be remedied by minor clarifications to the proposed language. Left unattended, the current language could create major ambiguities and uncertainties in long existing licensing practices.

CONCERNS OVER EXPANDING THE DISTRIBUTION AND IMPORTATION RIGHTS

Historically it has been clear that the rights of distribution and importation have involved the sale, rental, or other transfer of ownership or possession of physical copies of copyrighted works—activities in which broadcasters clearly do not engage. It has been equally clear that broadcast transmission is a public performance, and that such performances or communications are achieved by means of a transmission, for which broadcasters must obtain appropriate licenses. The concern of broadcasters is that these historically clear lines of distinction—between distribution and importation, in which broadcasters do not engage and for which they need not acquire rights, and public performances by transmission, for which they do need to acquire rights—appear to have blurred under the proposed legislation.

In its attempt to address the problems posed by the rapid development of digital communications over the NII and GII, the legislation expands the definition of "transmit" to include distribution of reproductions. Under the bill, the definition of a transmission would embody two concepts: a communication of a performance or display and a distribution of a reproduction. Because the right of distribution would not reference transmissions, both embodiments of the term transmission would apply, and at least make possible the argument that broadcast transmissions could constitute a distribution or importation. In this regard, we share the concerns raised by the Copyright Office regarding the potential harmful effect Section 2 may have on settled law:

Many of the Working Group's proposals concern clarification of the concept of transmission as it relates to works distributed over the information infrastructure. It is important to remember that transmission technology has been transporting communications for over a hundred years. The first common transmissions probably originated with the telegraph, and became even more commonplace with the introduction of telephones. Broadcasting was probably the first medium to exploit intellectual property through the use of transmissions.

The suggested changes address transmissions as they related to distribution of intellectual property over the information infrastructure. Since transmission is not a new technology, it is important to determine whether the suggested amendments might alter settled law in other areas of copyright jurisprudence. * * *

In considering the relationship of the distribution right to copies or phonorecords produced through transmissions, it would appear important to involve both owners who distribute over the information infrastructure, and owners who distribute through broadcast or cable transmissions. In any event, all the ramifications to the suggested changes should be considered before modifications are enacted into law. (Comments of the U.S. Copyright Office on the Preliminary Draft of the Working Group on Intellectual Property, 1984, pp. 8, 12).

Radio and television broadcasts are intended to be public performances that are heard and/or viewed by large audiences. Such broadcasts are inherently transient. Immediately after an image or sound is enjoyed, it disappears. the Copyright Office has observed, "if the copy [of a work] is merely transient—appearing only when the work is performed or displayed and there is not transfer of ownership, the distribution right should not be involved." (Comments, p. 10). We agree.

Broadcast transmissions are clearly transitory, and the Copyright Office's analysis is directly applicable. there is no changing hands of a copy of the copyrighted work on the part of a broadcaster. They do not transmit their programming with the intent of providing a copy to recipients.

Technology has now made it possible for broadcast stations to transmit their programs over the Internet. Such transmissions supplement broadcasters' over-the-air transmissions, are similarly intended to be performances, and are also not distributions.

The White Paper, in separate discussions on page 31 and 215, appears to acknowledge that performances or displays on television are not publications, and therefore would likely be found to be outside the scope of the copyright owner's dis-

tribution right. However, by amending Section 106 and the definition of "publication," both of which would recognize transmission as a means of distribution, the proposed legislation could be read to bring broadcast transmissions, for the first time, within the scope of the copyright owner's distribution right.

In PL 104–39, the "Digital Performance Right in Sound Recordings Act of 1995," Congress acknowledged the unique nature of broadcast transmissions by specifically exempting such transmissions from the coverage of the digital public performance right in sound recordings. Congress made clear that the intent of that legislation was to "provide copyright holders * * * with the ability to control the distribution of the product by digital transmissions * * * without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings." (House Rept. 104–274, p. 14).

A similar unequivocal expression that this legislation is not intended to reach and affect broadcast transmissions, either radio or television, is needed, as there is no threat to the distribution right of copyright owners. If the ambiguity in Section 2 is not clarified, it could negate the consensus policy adopted in the digital Performance Right legislation.

LIBRARY EXEMPTION

NAB shares the concerns of those who testified in the hearings on this legislation regarding the need to clarify that expanding the library exemption to permit the creation of digital copies of works must be limited to using such digital copies only for preservation and archival purposes.

Many libraries, pursuant to Section 108 of the Copyright Act, maintain collections of audio and audiovisual works produced by broadcasters that are properly used for research and scholarship. The potential difficulty with allowing libraries to make digitized copies of these works without limitation is the possibility of such copies, intentionally or inadvertently, being made available over an electronic network to multiple users and multiple sites that could result in massive downloading of works. Such hemorrhaging of works could threaten the copyright interests of many broadcasting organizations that are finding new and exciting ways to exploit their archival materials through CD–ROMs, electronic publishing and on-line.

To prevent such a result, revisions are needed to clarify that the proposed authorization to permit libraries to make digital copies applies only to sections 108 (b) and (c). It is also critical that the library exemption provision of the act include the following limitations:

(i) digitized materials must not be available on any library database that is accessible to the public other than at the site of the library or archive. If a database can be accessed from a remote location, any information or materials available on that database must be encrypted to prevent the unauthorized reproduction, distribution and/or performance of such materials or information; and

(ii) copyright and other proprietary notices and warnings in the original materials must be maintained in digitized versions. If the recommended copyright management provisions are enacted, these provisions should expressly be incorporated into the library exemption provision.

CLARIFICATION NEEDED CONCERNING THE CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS

Section 4 of the proposed legislation appears to prohibit the manufacture or distribution of any device or the offering or performance of any service, the primary purpose or effect of which is to circumvent any mechanism or system developed to prevent or inhibit copyright infringement "without authority of the copyright owner or the law."

The language of this provision is ambiguous, in that it is unclear whether the disarming of a copyright protection system without authority of the copyright owner or the law would, itself, be prohibited, even if it was done for the purpose of engaging in an activity that was otherwise authorized by law.

For example, the "authority of the law" permits a broadcaster to make an ephemeral copy or phonorecord of transmission programs, and to publicly perform works under fair use, without the copyright owner's consent. Under the proposed Section 4, would a broadcaster nevertheless be prohibited from disarming a copyright protection system for the purpose of engaging in these lawful activities because there is no explicit "authority under law" to disarm the device? Section 4 needs clarification that no independent authority under law is needed to disarm a copyright protection system under these circumstances.

CONCERNS WITH CMI PROVISION

Section 4 also creates a new Section 1202, which would prohibit knowingly providing false Copyright Management Information (CMI) and knowingly removing or altering CMI without authorization. The intent of the amendment is to provide information in an "electronic envelope" regarding a work's authorship, copyright ownership, date of creation or last modification, and terms and conditions for authorized copies. The problem that arises concerns the reality that the copyright ownership of "works" often changes over time, but the CMI contained in "copies" of such works will remain unchanged—indeed, Section 1202 forbids alteration.

Broadcasters may find themselves in the following situation: C, an owner of a registered work, authorizes a broadcaster to air copies of a work over a certain number of years. Later, C assigns the ownership to C2. If the broadcaster has no knowledge of the assignment and continues airing its licensed copy, does it violate Section 1201 by providing false CMI? Even assuming the broadcaster would not be liable, because it does not "knowingly" provide false CMI, the broadcaster could be enjoined by C2 from airing the material that bears false CMI. If the broadcaster does have knowledge of the assignment and alters the CMI to reflect it, does the broadcaster nevertheless violate the prohibition against altering CMI? Clearly, this amendment should not empower new copyright owners with an opportunity to exact more favorable licensing terms.

CONCLUSION

As content providers and copyright owners, broadcasters support the goal of the legislation to revise the copyright law in light of recent technological advances. While we believe that the legislation is not intended to cover broadcast transmissions, it is important to clarify this in the legislation to avoid disruption of current copyright policy. We welcome the opportunity to work with the Committee to clarify the ambiguities created by Section 2, as well as to address the other concerns we have raised.

PREPARED STATEMENT OF GARRY L. MCDANIELS, PRESIDENT, SKILLS BANK CORPORATION ON BEHALF OF THE SOFTWARE PUBLISHERS ASSOCIATION

On behalf of the Software Publishers Association (SPA), I wish to thank the Subcommittee on Courts and Intellectual Property of the House Committee for the opportunity to testify today on the National Information Infrastructure Copyright Protection Act of 1995 (H.R. 2441). SPA commends Representative Moorhead, Representative Schroeder, and other sponsors for advancing this important national discussion on the future of the Internet and other interactive telecommunications networks.

While SPA has some suggestions to modify H.R. 2441, its premises and goals are sound, and the bill will provide software developers with the incentive to create copyrighted works for businesses, homes, and schools. In particular, SPA supports the following objectives of H.R. 2441:

To confirm that transmissions of computer programs may be protected as distributions of copies to the public; To prohibit the importation, manufacture, or marketing of so-called "black boxes" for circumventing technical protection for computer programs; and To prohibit removal or alteration of copyright management information—the equivalent of digital "title pages."

These measures to amend the Copyright Act of 1976 are needed to maintain the balance between copyright owners and users because the Internet is making major changes in the way software developers and publishers provide their copyrighted works to businesses, homes, and schools. SPA urges Congress to keep its gaze fixed clearly on the limited measures proposed by H.R. 2441, and not on "phantom" legislation devised by some opponents whose real dissatisfaction lies not with the bill, but rather with commonly accepted provisions of the current Copyright Act.

SKILLS BANK CORPORATION—A LEADER IN EDUCATIONAL SOFTWARE

My company, Skills Bank Corporation, is a leading developer and publisher of educational software, specializing in focused training in reading, mathematics, language, writing, and study methods. In just ten years, Skills Bank has grown from an idea to about 70 employees, among them software writers, quality assurance testers, marketing representatives, and managers, in Baltimore, Maryland. Despite its small size, Skills Bank software is used today at almost 13,000 sites, representing nearly 25 percent of middle and high schools in the United States. Skills Bank's next product, the *Encyclopedia of Basic Skills,* will focus on "the home-school con-

nection"—using technology as a bridge to carry learning from school to home and back again.

SPA MEMBERSHIP—A POPULIST PROFILE OF THE SOFTWARE INDUSTRY

Skills Bank is a longtime member of the Software Publishers Association (SPA). SPA is the principal trade association of the personal computer software industry, and is committed to protecting the intellectual property and promoting the interests of the computer software industry. SPA has over 1,100 member companies, including almost 300 companies in California alone, including these prominent software developers and publishers:

Business software companies Borland International, Novell, Symantec, Peachtree Software, and Adobe Systems; Internet communication company Netscape Communications; Computer hardware companies IBM Corp., Apple Computer, and Silicon Graphics; Consumer software companies Broaderbund Software, Intuit, Spectrum HoloByte, and LucasArts Entertainment; and Education software companies Chancery Software, Jostens Learning, and, of course, Skills Bank.

With annual revenues under $10 million, Skills Bank is representative of SPA members and the software industry as a whole. In fact, a recent survey of over 800 U.S. software companies found that 85 percent had annual revenues under $10 million, and that 50 percent has annual revenues under $1 million.[1] Like Skills Bank, these software companies are very entrepreneurial, with nearly 60 percent setting out to establish new markets—like the Internet.[2]

THE OPPORTUNITIES AND CHALLENGES OF DIGITAL HIGHWAYS

We have all heard that the Internet promises to transform our society. As a former fourth grade teacher, I never cease being excited about how Internet resources can help students master a difficult lesson, or inspire them to share their curiosity with children thousands of miles away. When that happens, I am glad that my company's software plays a part in teaching the basic skills to open their minds.

As president of Skills Bank, I have more modest hopes for my business. By almost any measure, Skills Bank is a small company, but on the Internet all that matters is the quality of your software and your service to consumers. The digital highway promises to even the odds of our success in the marketplace, free us from shrinking retail shelves—which increasingly only make room for mass-market titles—and help keep the barriers to entering new software markets low enough for start-up companies.

This promise is reinforced in a recent report by Commercenet, a nonprofit corporation to facilitate electronic commerce. A recent survey found that 24 million people age 16 or older in the U.S. and Canada had access to the Internet, and that 18 million had access to the World Wide Web, the popular Internet graphic interface. The survey found that total Internet usage now exceeds that of on-line services such as America Online, and is approximately equivalent to playback of rented videotapes.[3] According to the survey, the two most popular uses were sending electronic mail (65 percent) and downloading software (31 percent.).[4]

To realize their full promise, the digital highways will need an abundance of cutting-edge software. Telecommunications networking software operates servers in offices and schools. Internet browsers and search engines search thousands of linked computers—including Congress's own THOMAS legislative database—and authoring tools to create vivid graphics for World Wide Web home pages. Content-based multimedia works for recreation and education—some of them from Skills Bank—help us pass the time or learn something new.

Software companies are rushing to meet this burgeoning consumer demand for software. Nearly 50 percent of software companies surveyed expected to use the Internet for product demonstration or marketing in 1995—a major increase from the previous year, when less than 20 percent were doing so.[5] But the Internet alone is not enough for Skills Bank and other software entrepreneurs to succeed—or for our customers to enjoy its full promise. To keep up with consumer demand and our com-

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[1] Price Waterhouse LLP, 1996 Software Business Practices Survey, p. 38. The findings were consistent with a smaller survey conducted by SPA late last year.

[2] *Id.*, at 34.

[3] Executive Summary, CommerceNet/Nielsen Internet Demographics Survey (Oct. 30, 1995) The CommerceNet Consortium is a nonprofit corporation formed to facilitate the use of an Internet-based infrastructure for electronic commerce. See *http://www.commerce.net.*

[4] Executive Summary, CommerceNet/Nielsen Internet Demographics Survey (Oct. 30, 1995) The CommerecNet Consortium is a nonprofit corporation formed to facilitate the use of an Internet-based infrastructure for electronic commerce. See *http://www.commerce.net.*

[5] 1996 Software Business Practices Survey, *supra.*

petitors, Skills Bank has since 1986 spent $20 million in research and development—sometimes as high as 40 percent of our revenues.

Companies like Skills Banks need a strong copyright law to protect that investment. Article I, Section 8 of the United States Constitution gives Congress the power "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This Constitutional purpose is embodied in the Copyright Act of 1976, which provides an incentive to create by giving authors and other owners of copyright certain rights in computer programs and other literary works, among them the exclusive rights to authorize reproduction, adaptation, and distribution to the public, subject to some limitations.[6]

That investment is chronically undermined by losses from software piracy, a form of copyright infringement involving the illegal duplication and distribution of software without permission of the copyright owner.[7] One out of every five consumers recently surveyed admitted that they had copied software from friends at work or school.[8] The annual SPA Global Software Piracy report estimates that over $1 billion in business applications alone were pirated in the United States in 1994 from all sources, including bulletin board services (BBS) and the Internet. According to that measure, one out of four business programs being used in the United States is an illegal copy.[9]

The easy reproduction of computer software, and the far-flung messaging capabilities of the Internet, have shifted the legal balance far away from copyright owners. Whenever software is downloaded or uploaded on the Internet or other networks, an identical and fully functional copy is reproduced on the user's computer—all too often without the copyright owner's authorization. Moreover, multiple copies of this pirate software can be distributed at no incremental cost to other computers around the world. The following examples illustrate this problem:

A fellow SPA member company, id Software of Texas, finds that its best-selling computer games, such as DOOM and DOOM II, are routinely pirated on the Internet—even though id has offered demonstration versions for trial use at no charge.

One suspected bulletin board service had more than 100,000 separate files available for downloading, including many popular computer programs, and received more than 4,000 calls daily from 14,000 paying subscribers in the U.S., Canada, and Western Europe.

May 1995—A subscriber to an online service sent over 150 unlicensed computer programs attached to e-mail messages, but the online service provider refused to take action against him for this clear violation of the Terms of Service even after being notified by the e-mail recipient.

Over $1 million in pirated software was alleged to have been downloaded from an Internet site—even though it had operated for less than one month when the FBI shut it down.

With examples like these, it is no wonder that a recent survey found that software piracy and copy protection were ranked among the five most important issues for the software industry—up from 11th place the previous year.[10] To deter online software piracy, Congress should recognize that willful copyright infringement on a commercial scale is a crime, even if there is no private financial gain or commercial advantage, and provide law enforcement with the necessary supervision and resources to investigate and prosecute pirate BBS and Internet site operators.

SPA SUPPORTS THE GOALS OF H.R. 2441—A DIGITAL UPDATE FOR THE COPYRIGHT ACT

Companies like Skills Bank need an updated copyright law to effectively protect their copyrighted software on the Internet and other networks. In particular, Skills Bank and SPA supports three objectives of H.R. 2441:

To confirm that transmissions of computer programs are fully protected by copyright;

To prohibit the importation, manufacture, or marketing of so-called "black boxes" to circumvent technical protection for computer programs; and

To prohibit removal or alteration of copyright management information—the equivalent of digital "title pages."

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[6] Section 106 of the Copyright Act of 1976, 17 U.S.C. 106.

[7] Section 501 of the Copyright Act of 1976, 17 U.S.C. 501.

[8] SPA 1995 Consumer Survey.

[9] 1994 priacy rates and losses estimated in The SPA 1995 Global Software Piracy Report, at 5. The estimate does not include other types of software, such as multimedia and educational titles.

[10] 1995 Software Business Practices Survey, *supra.*

The premises and goals of H.R. 2441 are sound, and provide software developers with the incentive to create copyrighted works for users in business, homes, and schools.

Distribution by transmission

SPA supports the amendment of Section 106(3) to include transmissions of reproductions within the exclusive right of distribution, and the amendment of Section 101 to define transmission of a reproduction as "distribut[ing] it by any device or process whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent."

H.R. 2441 should help Skills Bank and other software companies take action against unauthorized Internet transmissions. Unlike television and radio programming, many if not all transmissions of computer programs and other works will result in complete digital reproductions being received by users. It is very easy for users to retain complete and perfectly functioning copies of the works they receive, and then to send them to as many other Internet sites as they wish—with potentially significant harm to the copyright owner. These circumstances differ significantly from the public performance or public display of copyrighted works via broadcast or cable television, exclusive rights which are subject to statutory limitations in part because they typically cannot be captured and redistributed in digital form.

Prohibition of devices and services that circumvent technical protection

H.R. 2441 would add a new Chapter 12 to the Copyright Act of 1976, of which Section 1201 would prohibit the importation, manufacture, or distribution of any device, and prohibit any service, if its primary purpose or effect is to circumvent any technical means of preventing or inhibiting copyright infringement without the authorization of the copyright owner or the law.

Under Section 1203, any person injured by these circumvention devices and services—often called "black boxes" could bring a civil action in U.S. district court for a number of remedies provided for copyright infringement—injunctive relief, impoundment and destruction of the devices, actual damages and profits, and reasonable attorney's fees to the prevailing party. Section 1203 would also permit the injured party to elect statutory damages ranging from $200 to $2,500 per device, and authorize the court to order remedial modification of offending devices. Finally, Section 1203 would authorize a court to impose triple damages for repeated violations within three years.

SPA supports the goal of this provision, and urges Congress to study whether the "primary purpose or effect" test could be made less burdensome for copyright owners, and whether adjusting civil remedies and establishing criminal penalties under appropriate circumstances would provide practical deterrents against these devices and services.

Software companies distributing copies of their software on the Internet may require software publishers to consider two forms of technical protection—encryption to ensure that transmissions are not intercepted, and copy protection to inhibit serial copying. By prohibiting "black boxes," rather than mandating standard anti-copying technology, authors and rights holders will have the option whether or not to restrict access or implementation of their software. This will enable them to listen and respond to the desires of consumers in the marketplace, including the amount of serial copying they permit.

Calls for Congress to reject this measure are misplaced. First, H.R. 2441 would not require software publishers to use technological protection. Rather, it gives them additional security if they chose to do so, and their customers continue to license their software. Second, technical protection against copying has thrived for years in the software industry, not only in the form of dongles and other hardware locks for high-priced CAD/CAM applications, but also in the form of the CD–ROM disk, which unlike the floppy disk is still inconvenient and expensive for users to copy.

Prohibition of false or altered copyright management information

H.R. 2441 would create a new Chapter 12 for the Copyright Act of 1976, Section 1202 which would prohibit the knowing removal or alteration of copyright management information without the authority of the copyright owner or the law. Copyright management information (CMI) would be defined as the name and other identifying information of the author and copyright owner of a work, the terms and conditions for using the work, and other information prescribed by the Register of Copyrights.

In addition, Section 1202 would prohibit the knowing removal or alteration of CMI, and knowingly publicly distributing false CMI, or importing false CMI for public distribution. Unless otherwise authorized by the copyright owner or the law, Section 1202 would also prohibit the knowing distribution or importation for distribu-

tion of altered CMI, or the knowing distribution or importation for distribution of copies from which CMI has been removed.

SPA supports the goal of this measure, but urges Congress to clarify that CMI is not mandatory. Rather, CMI should be defined as whatever information, if any, the author and copyright owner decide to use in connection with the work. This modification would be analogous to the pseudonymous and anonymous works implied in Article 15 of the Berne Convention.

Shareware developers already use various forms of CMI to identify their computer programs before releasing them into the Internet. Now, mainstream software companies and groups like the American National Standards Institute and the Platform of Internet Content Standards (PICS), are studying how CMI can be used to identify copies of computer programs.

Critics allege that this measure would prevent them from disabling so-called "active" CMI agents to protect themselves from invasion of privacy. It is true that intelligent software agents could be used, if need be, to recognize CMI, to measure software use on the Internet, and collect royalties for the copyright owners. It should be remembered, however, that there is no privacy interest in copyright infringement, and that Congress would be free to evaluate existing laws on computer crime and privacy, and act if necessary to protect the public.

H.R. 2441 would also make several other changes in the Copyright Act, and SPA respectfully requests leave to make additional comments on these points.

Finally, many criticisms of H.R. 2441 focus on "phantom" provisions that are not proposed by the bill at all, and SPA would like to offer some comment on two of them here—expanded copyright exemptions for libraries and schools, and expanded exemptions from liability for online services and Internet access providers.

Educational and library fair use

Some representatives of schools and libraries have called for expanding "fair use" guidelines—which currently identify "safe harbors" for schools and libraries to reproduce and distribute books, periodicals, and music without permission—to include digital reproduction and network distribution. As an educational software publisher, Skills Bank agrees with SPA that expanding fair use guidelines to permit digital reproduction and network distribution could dramatically affect the business of hundreds of software developers and publishers who market instructional software for K–12, home, special needs, adult, school-to-work, vocational and higher education.

Software licensing—including lab packs, concurrent licenses, and update site licenses—provides the best means to meet the desire for public access to computer programs. Market forces have dramatically lowered software prices, and software licenses have become increasingly flexible to accommodate the needs of schools. For commonly used programs, such as word processing programs, where many computers will have the same technology-based program installed, volume discount agreements can save the school district money. Some software publishers even report that schools are now negotiating licenses on a state-wide basis, and asking for significant licensing flexibility for the mere privilege to compete for the business of their school districts.

In my experience at Skills Bank, licensing is a win-win situation for software companies and educators alike. First, by increasing volume for software companies, licensing drives prices down for schools. Second, licensing is flexible enough to embrace the concept of "schools without walls," and I am sure that today's school district licenses will become community-wide licenses to make the most of the "home-school connection." Third—and this is very important—the increases in volume brought on by broader licenses will enable all school districts in the community to make use of the licensed software. This promises to erase the economic inequities between school districts, and ensure that some of our children do not become "information have-nots."

Liability of online service and internet access providers for indirect infringement

H.R. 2441 has no provision affecting the potential liability of online service providers, Internet access providers, and bulletin board services for their own direct infringement or indirect infringement by their subscribers. Because the U.S. district courts are now acting on several cases involving this issue, SPA believes that efforts to alter their liability are premature.

SPA relies on current copyright law—including liability for indirect infringement—to protect hundreds of software companies from piracy, and the software industry faces significant new hurdles in fighting software piracy on the information highway. Moreover, software developers have handled liability for direct infringement by their employees and contractors for years through indemnification and insurance.

A final point is worth making. On the Internet and other networks, software publishers and telecommunications service providers will be partners, and each should learn to value the contribution the other will make to success on the Internet. Therefore, SPA is deeply interested in any change in existing law that could make that fight more difficult or less effective, and would appreciate the opportunity to speak with interested Members of Congress and organizations about such efforts.

CONCLUSION

Congress should take prompt action to enact the reforms proposed in H.R. 2441 because the dramatic growth of the Internet, and consequent business practices—will wait for nothing, even—with all due respect—the Congress of the United States. According to a recent survey, an estimated 24 million people now have access to the Internet, spending about the same time using the Internet as playing rented videotapes.

Without the measures now before Congress, it is true that Skills Bank and other software companies may make some software available on the Internet for promotional purposes or supplemental uses. But we would not have the incentive, and frankly just could not afford the risk, of putting our best programs and multimedia works on the Internet. While our customers—schools and parents—could still license our software through stores and direct mail, they would not enjoy the full promise of the Internet and the digital highway.

An entire generation of Internet users is forming its attitudes and behavior toward copyrighted works at this very moment. Their respect for the copyrights of others will affect the commercial practices of Skills Bank and other software companies. Constitutional purpose of promoting the progress of science and the useful arts—as well as the Internet—is best served by enacting this digital update of the Copyright Act to provide the incentive for software companies to make their best software available on digital highways.

PREPARED STATEMENT OF FRANCES W. PRESTON, PRESIDENT AND CEO, BROADCAST MUSIC, INC.

Thank you for this opportunity to submit a written statement to the Committee on a very important piece of legislation, S. 1284, the "NII Copyright Protection Act of 1995." This written statement is virtually the same as the one that I presented on February 7, 1996 to the House Judiciary Subcommittee on Courts and Intellectual Property.

I submit this statement as President and Chief Executive Officer of Broadcast Music, Inc. (BMI). BMI, one of this country's three performing rights organizations, represents the public performing rights of over 180,000 songwriters, composers, and music publishers in all 50 states and throughout the world. BMI also represents thousands of foreign composers and songwriters whose works are performed in the United States. There are over 3 million musical works in the BMI repertoire. As this Committee knows, BMI has testified on numerous occasions about amendments to the copyright law to meet technological advances in the distribution and performance of music.

I am not an attorney, nor am I a technocrat. My expertise is the music business, which has been my life for over three decades. For the past two years, I and thirty-six other distinguished Americans have served as members of the National Information Infrastructure Advisory Council (NIIAC). I do not write as a representative of the NIIAC. But I feel that the Council members wrestled with and achieved consensus on a number of issues, most particularly the importance of the availability and the protection of intellectual property in the National Information Infrastructure (NII).

It is my intention to cover four subjects. First, content must be protected on the Information Superhighway; without content, the Superhighway will have far less passengers. Second, the public performing right must be defended, and any attempts to weaken it should be opposed. Third, some specific concerns, with drafting suggestions, will be expressed about section 2 of S. 1284. Finally, several observations will be made about other provisions in S. 1284 or raised by its provisions.[1]

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[1] Attached to this statement is a legal memorandum on the impact of the NII Copyright Protection Act of 1995 on the public performing right.

I.

First, BMI applauds the underlying motivation behind S. 1284—that intellectual property must be protected in the electronic universe. Chairman Hatch, when you introduced S. 1284, you emphasized this underlying motivation in your floor statement. You observed that the success of the NII could be jeopardized without the protection of content.[2] Several weeks ago, the Wall Street Journal ran an interesting article entitled "Internet's Popularity Threatens to Swamp The On-Line Services," reporting that on-line services (such as America On-Line, Compuserve and others) are entering the content creation business in order to generate revenues for themselves. Last week, we read in the Washington Post that "MCI and Microsoft Plan On-Line Internet Effort." Bill Gates reflected on the rush of major companies to turn the Internet into a profitable venue for themselves and stated: "You're going to see a lot of partnerships." Microsoft has already teamed up with NBC to make content available through its on-line service, the Microsoft Network. With passage of communications act reform, just think what Americans are going to see in terms of partnerships and resultant competition. Many partnerships, I predict, will inevitably be rooted in the economic value of content, be it information or entertainment.

The Report of the Working Group on Intellectual Property Rights (chaired by the Honorable Bruce A. Lehman) on "Intellectual Property and the National Information Infrastructure" (White Paper) wisely predicted the convergence of technology and content, with the latter driving technological changes: "All the computers, telephones, fax machines, scanners, cameras, keyboards, televisions, monitors, printers, switches, routers, wires, cables, networks and satellites in the world will not create a successful NII, if there is not content. What will drive the NII is the content moving through it." (at page 11). This Committee scarcely needs reminding that the full potential of the NII cannot be achieved without the protection of content. The rights conferred under this country's intellectual property laws, established by Congress, are a means by which important public policy goals are achieved. The protection of creators' exclusive property rights in their respective works presently remains and shall always remain the bedrock public policy. It is the best way for policy makers to spur artistic and intellectual creativity in a free market economy.

During more than two centuries of American independence, with periodic amendment, the Copyright Act has provided protection for an ever-increasing variety of works of authorship. The genius of our intellectual property laws, particularly in an era of reduced federal expenditures, is that they are self-enforcing, cost-free to the taxpayer, and without the need for large government bureaucracies. Stated simply, the protection of intellectual property by the Copyright Act has been responsible for a success story in the United States. Your goal in legislating for the Information Superhighway should be to build upon that success. You are on the right track.

II.

My primary focus is on section 2 of S. 1284, which provides amendments to current copyright law to clarify that an electronic transmission may be a distribution under copyright law. BMI's position is very clear. We are not against clarification of a distribution by transmission right, as long as the current performing right continues to exist and songwriters are not harmed. If Congress enacts the proposed legislation, the bill must be explicitly clear that these rights co-exist in the world of digital communication technologies.

S. 1284 provides for peaceful co-existence of rights. Section 2 does not create a new right; it merely clarifies that copies of phonorecords of works can be "distributed" to the public by transmission, and that such transmissions fall within the exclusive distribution right of the copyright owner.

To understand fully how section 2 may have an impact on the income of songwriters and music publishers, some background is in order about BMI and how songwriters and music publishers earn their livings. BMI's fundamental role is to license one of the six exclusive copyright rights, the right to perform publicly musical works, for uses on radio, television, at concerts, and so forth—wherever music is heard or communicated to the public. In proposing changes to this nation's intellectual property system, we would ask that you not think in terms of the superstar songwriters such as Paul Simon, Dolly Parton, Gloria Estefan, or Aretha Franklin.

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[2] You aptly observed: "Highways, of course, are meant to be used, and in order to be used, they must be safe. That's why we have 'rules of the road' on our asphalt highways and that's why we need rules for our digital highway. No manufacturer would ship his or her goods on a highway if his trucks were routinely hijacked and his or her goods plundered. Likewise, no producer of intellectual property will place his or her works on the information superhighway if they are routinely pirated." 141 Cong. Rec. S14550 (daily ed. Sept. 28, 1995).

The typical songwriter does not receive income from making records of his or her own songs, nor does he or she receive income from concert tours or television appearances, commercial endorsements, sales of souvenirs, and so forth. The typical songwriter receives a modest income from his or her creative efforts at writing music that is publicly performed by others. Any change in copyright law which would constrict or adversely affect the performing right would be disastrous to the livelihood of most songwriters.

Under present law, a work is publicly performed if it is transmitted in such a way that it can be seen or heard by public, such as a broadcast, or by a limited portion of the public, such as cable or satellite transmissions which are available only to subscribers. Similarly, a work is publicly performed if it is transmitted electronically over-the-air by a network to a local broadcasting station or a cable system. The transmission does not lose its characterization as a performance depending on the number of people who choose to receive the transmission. Indeed, an electronic transmission of a musical work is a public performance even if no one hears the transmission. Through collective rights organizations—BMI, ASCAP and SESAC—songwriters receive royalties for these performances. These performance royalties allow songwriters to make a living by being compensated for their creative efforts.

III.

BMI does have concerns which relate to how best to achieve the underlying goals of section 2 without causing unintended consequences to the public performing right.

Under current law (17 U.S.C. § 101), to "transmit" a performance "is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." Section 2 of S. 1284 adds a new and independent sentence to section 101: "To 'transmit' a reproduction is to distribute it by any device or process whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent." While these two sentences do not seem to be mutually exclusive and do not stand in competition with each other, it should be made explicitly clear in any legislation that such rights mutually co-exist and a single transmission may implicate both copyright rights. This is consistent with the "bundle of rights" philosophy embraced by the Copyright Revision Act of 1976 and endorsed by the White Paper.

If this understanding is not clear from the express language of section 2, the Committee should consider a modest drafting change to clarify that any transmission of a reproduction can also be a transmission of a performance.

The Committee is to be commended for the expertise with which it managed to clarify this fundamental concept in the Digital Performance Right in Sound Recordings Act of 1995 (1995 Act); Public Law 104–39, signed by the President on November 1, 1995. That Act, in its express text, clarifies that nothing "annuls or limits in any way * * * the exclusive right to publicly perform a musical work, including by means of a digital audio transmission * * *." It is BMI's opinion that the Committee should consider insertion of similar language in the express language of S. 1284.

Our concerns about section 2 and its legislative history are substantially accommodated by the holding of hearings and the creation by the Committee of its own record and debate on the issues. We presume that the Committee will prepare its own legislative history, and BMI would be pleased to work with you to clarify what is intended by the changes proposed in section 2 of S. 1284.

The Committee may hear some creative arguments about distinctions that might be made between transmissions of copies of works and transmissions of performances or displays of works. Some would express the view that "downloading" musical works using computer, and other "compressed" digital file transfer, ought to be considered only a distribution and not a performance. They interpret the existing law as being limited to transmissions that are capable of being seen or heard while being electronically transmitted and argue that the sending of a digitized form of a work does not constitute a performance unless and until the digital information is reconverted into sounds or images that are audible or visible.

The problem with this view is that if it applied to digital transmissions, it could equally apply to the analog radio and television broadcasts which were so clearly meant to be covered by the public performance right. After all, standard radio broadcasts are not audible to the human ear until the radio waves received by the antenna are reconverted by the radio receiving set. Moreover, conventional analog radio equipment is fully capable of receiving radio signals and recording them on tape even if the loudspeakers attached to the radio receiver are not turned on and no one at home is listening. Home taping of conventional television and radio sig-

nals is, of course, a widespread practice. The fact that on-demand transmissions might be downloaded or otherwise reconverted into audible sound at a time after the transmission has occurred would seem to be made irrelevant by a provision in the Copyright Act that a transmitted performance remains "public" even if it is received "at different times" by each member of the public. Furthermore, the legislative history makes it clear that a transmission is complete once it is sent, so long as it is capable of audible reception by the public.

The recent enactment of the 1995 Act, which became effective several weeks ago, supports our view that digital transmissions of musical works do not have to be seen or heard in real time in order to be considered public performances under the Copyright Act. In fact, at the current meeting of the Committee of Experts on the Berne Protocol being held at the W.I.P.O. (World Intellectual Property Organization) in Geneva, Switzerland, the delegate for CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs), delegates of various countries, as well as delegates of non-governmental organizations, have espoused the view that a specific technology should not and does not eliminate the public performing right. Compressed transmissions on the NII implicate the performance right every bit as much as real-time transmissions. The fact that performances may occur in diverse locations and at different times will not exempt them for the public performing right.

IV.

The NII Copyright Protection Act of 1995 is minimalist in its approach to the many intellectual property issues raised by the NII. It does not confront problems that may be looming on the distant horizon. The fact that more comprehensive amendments are not being proposed is a tribute to the resiliency of the Copyright Act and to this Committee which, of course, is responsible for the good health of the Act.

Allow several parting thoughts about some other issues either raised by provisions in S. 1284 or likely to be raised during the hearing process.

Liability.—The question of liability in the NII environment is certainly important, not only for those who engage in distribution and carriage activities but for content providers as well. BMI submits that the issues are not yet ripe for congressional resolution. On-line service providers, regional telephone companies, long-distance carriers, and cable television operators have played or will play an integral role in the technological development and expansion of the NII. The growth of distribution activities has been phenomenal; that growth rate shows little sign of decreasing.

Growth does not mean that we should eliminate or reduce liability for copyright infringements in the digital universe. To the contrary, if the protection of exclusive rights is emasculated, the flow of content will be reduced, and the growth rate will decrease. As noted above, distribution interests of today are becoming the content providers of tomorrow. Their positions on liability may change overnight.

The intersection of technological change, intellectual property and liability issues is nothing new for this Committee. You have experienced controversial issues in the past—posed by broadcasting, cable television, satellite delivery services, semiconductor chips, and digital audio recording devices—and your responses have not been to eliminate liability but to rechannel technological changes into the copyright system. Debate about what sort of statutory scheme you should create will have to await another day and another series of hearings, and perhaps private sector negotiations. For the moment, I can assure you that the solution does not lie in an absolution from liability.

Licensing.—Voluntary collective licensing—as manifested by BMI's over fifty years of experience—has played and will continue to play an important role in the licensing of intellectual property. BMI's current licensing initiatives with new-technology users of musical works is evidence that collective licensing retains the tremendous efficiency advantages it has always enjoyed for frequent uses that are each of small economic value but are very significant in the aggregate. Voluntary collective licensing is superior to compulsory licensing in every regard. Voluntary licensing also keeps government out of a successful economic endeavor and allows free market forces to prevail. For those transmission entities who are extremely concerned about liability issues, BMI invites you to explore licensing opportunities.

Copyright Management Information.—Copyright management information associated with a work—such as the name of the author or copyright owner and the terms and conditions for use of the work—will serve to promote licensing and reduce liability concerns. The integrity of this information will be important in the NII and S. 1284 is a positive step forward in promoting the development and use of reliable rights management information. In this regard, BMI supports the relevant provisions of section 4 of S. 1284.

Technological Protections.—Technology protections for copyrighted works will flourish in the digital environment just as they are flourishing in the areas of system security, currency protection, credit and banking, and privacy. While BMI is not currently affected by the provisions of the bill that bar the circumvention of copyright protection systems, we believe that enactment of such provisions would be sound public policy.

International.—Intellectual property in the information era has global ramifications and is becoming increasingly internationalized. Through "national treatment," international intellectual property treaties provide a foundation for a level playing field. With the clarification of section 2 that we are requesting, S. 1284 is compatible with our treaty responsibilities and represents a positive step forward for the creation and dissemination of works in the Global Information Infrastructure (GII). If enacted, the United States—through its trade negotiators and intellectual property experts—will have to work to have other countries accept similar treatment for copyrighted works transmitted across national borders.

Because copyright laws are territorial, and international treaties leave room for national legislative determinations, we may soon confront an era of confusion about what country's copyright law applies for transmissions from one country to another. This issue, like the liability issues, will have to await another day.

Fair use.—As incorporated in the Copyright Act and as developed by the federal courts, the doctrine of fair use will no doubt apply in the digital environment. The NIIAC determined that the ability to make fair use of copyrighted works should not be diminished or weakened in the context of new technologies, and we concurred in that decision.

Libraries and the Visually Impaired.—Section 3 of S. 1284 provides several exemptions for libraries and the visually impaired, and BMI has no objections to these provisions.

Education.—Education of the public about the need to respect intellectual property rights and responsibilities will be critical to the successful development of the NII. Regretfully, copyright responsibility is rarely taught in primary and secondary schools, institutions of higher learning, or as part of the life-long learning process envisioned by the NII. This must change. BMI has committed itself to participating in the ongoing educational process.

CONCLUSION

BMI supports S. 1284 and stands ready to work for its expeditious enactment. We look forward to working with the Committee to resolve the drafting concerns raised in this statement and any other issues that might arise.

PREPARED STATEMENT OF SESAC, INC.

SUMMARY

SESAC, Inc. (SESAC), which was founded in 1930, is one of the three U.S. music performing rights organizations which license public performances of nondramatic musical works on behalf of copyright owners. SESAC represents some 2,500 writers and publishers and more than 170,000 musical compositions of all types.

1. SESAC fully supports the underlying purpose of S. 1284—to ensure that copyrights and other intellectual property rights are protected on the NII and in digital transmissions of copyrighted works generally.

2. SESAC believes, however, that it is important to clarify that any new right of distribution of a reproduction by transmission will be in addition to, and separate and apart from, the Section 106(4) public performance right. Under the "bundle of rights" concept underlying the 1976 Copyright Act, a digital transmission of a copyrighted work can implicate both the public performance right (on the one hand) and the distribution and reproduction rights (on the other). To avoid any ambiguity, SESAC suggests that language be added to S. 1284 to clarify that the new transmission right is not intended to diminish or weaken in any respect the public performance right that has long been recognized in Section 106(4). This approach would be consistent with that of the Digital Performance Right in Sound Recordings Act of 1995, where Congress expressly provided that the new digital performance right in sound recordings was not intended to diminish in any respect royalties payable to copyright owners of musical works for the public performance of their works.

3. The method or means by which a work is transmitted to members of the public should not affect whether the public performance right is implicated. Transmission that take place in compressed time, as well as those occurring in real time, can in-

volve public performance of copyrighted works, as can transmissions where the recipient makes a copy of the content that is transmitted.

4. Songwriters generally derive a significantly greater proportion of their livelihood from public performance rights than from other sources. Therefore, any change in the copyright law that would diminish or weaken the public performance right would have a severe detrimental impact on songwriters and their ability to earn a livelihood and, ultimately, on the creation of new music.

SESAC appreciates the opportunity to present its comments to the Committee and looks forward to working with the Committee to address the above concerns and to seek speedy enactment of S. 1284.

SESAC, Inc. ("SESAC"), by its undersigned counsel, hereby submits its comments on S. 1284 (the "NII Copyright Protection Act of 1995").

I. INTRODUCTION

SESAC is one of the three U.S. music performing rights organizations which license public performances of nondramatic musical works on behalf of copyright owners.[1] Founded in 1930 to represent the unrepresented composer and author, SESAC was originally known as the Society of European Stage Authors and Composers, a connotation that was discontinued nearly 60 years ago as the SESAC repertory become overwhelmingly Americanized. Today SESAC has an entrepreneurial spirit and a desire to seek out and enter into creative and alternative licensing arrangements. SESAC currently represents some 2,500 writers and publishers and more than 170,000 musical compositions of all types.[2]

SESAC applauds the underlying purpose of S. 1284—to endure that copyrights and other intellectual property rights are protected on the National Information Infrastructure ("NII") and in digital transmissions of copyrighted works generally. As Chairman Hatch stated in his floor statement introducing the bill: "Protecting the property rights of the owners of intellectual property not only induces them to make their products available, it also encourages the creation of new products * * *."

As Senator Leahy stated in his floor statement: "We must and will update our copyright laws to protect the intellectual property rights of creative works available online. The future growth of computer networks like the Internet and of digital, electronic communications requires if * * *."

And as the "White Paper" concluded, "[w]hat will drive the NII is the content moving through it."[3]

In these comments, SESAC (1) examines the relationship between the public performance right and the proposed new transmission right in order to demonstrate that Congress should make it clear that the new right will be in addition to, and separate and apart from, the public performance right; and (2) reviews evidence of the longstanding significance of the public performance right, not only to songwriters and music publishers, but to a broad range of business relationships in the entertainment industry. In sum, as a matter of logic, business practice, copyright tradition and sound public policy, Congress should take care not to diminish or weaken the public performance right in any respect.

II. IT IS IMPORTANT FOR CONGRESS TO CLARIFY THAT THE NEW TRANSMISSION RIGHT IS NOT INTENDED TO DIMINISH OR WEAKEN THE PUBLIC PERFORMANCE RIGHT IN ANY RESPECT

A. Congress should make clear that the new transmission right will be in addition to, and separate and apart from, the Section 106(4) public performance right

In order to ensure that the rights of copyright owners will be protected with respect to digital transmissions of copyrighted works via computer networks and other

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[1] The Copyright Act contains a provision which defines a "performing rights society" as "an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc." *See* 17 U.S.C. § 114(d)(3)(E)(ii), which was added by the Digital Performance Right in Sound Recordings Act of 1995. A similar provision was contained in the Copyright Act of 1976.

[2] The SESAC repertory encompasses virtually every category of musical compositions, including adult contemporary, black/urban, jazz, Hispanic, big band, country, gospel, dance, educational, Latin, classical, polka, rock, marching band, new age, film scores, television theme music and advertising jingles.

[3] Report of the Working Group on Intellectual Property Rights of the Information Infrastructure Task Force, "Intellectual Property and the National Information Infrastructure" ("White Paper") at 11.

means, S. 1284 would amend the statutory delineation of the distribution right in Section 106(3) of the Copyright Act to include distributions "by transmission", and would add the following clause to the definition of "transmit" in Section 101 of the Copyright Act: "To 'transmit' a reproduction is to distribute it by any device or process whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent."

While SESAC wholeheartedly supports S. 1284's objective of ensuring that the rights of copyright owners are protected with respect to digital transmissions of copyrighted works, we believe it is important to ensure that the new transmission right will not have the effect of diminishing or weakening the exclusive public performance right vested in copyright owners pursuant to Section 106(4) of the Copyright Act.[4] In particular, Congress should make clear that a "transmission" does not only implicate either the performance or display right (on the one hand) or the distribution and reproduction rights (on the other); rather, Congress should expressly recognize that a transmission may appropriately constitute both a transmission of a performance or display[5] and a distribution of a reproduction.

It is well settled in current copyright law—and this was one of the fundamental tenets of the comprehensive 1976 copyright law revision—that a particular use or exploitation of a copyrighted work can implicate more than one of the exclusive rights under copyright enumerated in Section 106. For example, if a motion picture producer wishes to make a sound recording of a copyrighted musical composition and incorporate it in a motion picture exhibited in theatres and distributed on home video, at least four of the exclusive rights enumerated in Section 106 of the Copyright Act are implicated with respect to the copyright in the musical composition: the reproduction right, the right to prepare a derivative work, the distribution right, and the public performance right.[6] Producers and others acquiring intellectual property rights in creative works frequently obtain multiple rights and licenses from several parties. This is consistent with the "bundle of rights" concept underlying the 1976 Copyright Act, which provided for "divisible copyrights" in the sense that any of the exclusive rights under copyright which are set forth in Section 106 may be transferred and owned separately.[7]

B. The method or means by which a work is transmitted to members of the public does not affect whether the public performance right is implicated. Under current copyright law, transmissions over computer networks can implicate the public performance right

SESAC does not believe that the owner of the Section 106(4) public performance right under copyright in a particular work should have any lesser degree of rights in that work merely because of the method or means by which the work is transmitted to members of the public (*e.g.,* in digital form on a computer network, as compared to more "traditional" or "conventional" means such as transmission via broadcast or cable television).[8] It should be made clear that any new right of distribution of a reproduction by transmission will be in addition to, and separate and apart from, the Section 106(4) public performance right. If the public performance right is implicated under existing law, it should not be implicated to any lesser degree under the proposed amendment contained in S. 1284.

Section 101 of the Copyright Act defines the performance or display of a work "publicly" to include, *inter alia:* "(2) to transmit or otherwise communicate a performance or display of the work * * * to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

The legislative history of the Copyright Act of 1976 indicates that in providing broad language for the definitions of "publicly" and "transmit," Congress anticipated that the public performance right would be implicated in an increasingly important

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[4] The Section 106(4) exclusive right "to perform the copyrighted work publicly" applies to owners of copyrights in "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works". 17 U.S.C. 106(4). The Digital Performance Right in Sound Recordings Act of 1995 added a new public performance right "by means of a digital audio transmission" for sound recordings. *See* 17 U.S.C. 106(6).

[5] Under existing law, the definition of "transmit" in Section 101 of the Copyright Act refers to the transmission of "a performance or display".

[6] In addition, of course, different copyright owners may own separate rights in the work (*e.g.,* the motion picture producer will likely own the copyrights in certain elements of the motion picture).

[7] *See Ladd* v. *Law & Technology Press,* 762 F.2d 809, 813 n.4 (9th Cir. 1985).

[8] Every era, of course, has its own "new" technologies, which eventually become the "old" or "traditional" technologies of subsequent eras.

manner in the transmission of copyrighted works over communications networks. The House Report concluded that "performances and displays are continuing to supplant markets for printed copies"[9] and that: "The definition of 'transmit'—to communicate a performance or display 'by any device or process whereby images or sound[s] are received beyond the place from which they are sent'—is *broad enough to include all conceivable forms and combinations of wired or wireless communications media,* including but by no means limited to radio and television broadcasting as we know them. *Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a 'transmission,' and if the transmission reaches the public in [any] form, that case comes within the scope of clauses (4) and (5) of section 106.*"[10]

The House Report also made clear that transmissions such as those over computer networks could constitute "public" performances which would implicate the public performance right under Section 106(4): *"[A] performance made available by transmission to the public at large is 'public' even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission* * * *. Clause (2) of the definition of 'publicly' is applicable 'whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.'"[11]

SESAC submits that where a work incorporating a performance of a copyrighted work (*e.g.,* a sound recording or audiovisual work incorporating a performance of a copyrighted musical composition) is transmitted over a computer network (or via satellite signals or other media) to members of the public, such a transmission constitutes a public performance to the same degree that it would if the transmission were via a cable television network or a television or radio station's broadcast signals. In the context of such a transmission, the images or sounds comprising the performance are "picked up or displayed" to members of the public, just as they are through a cable network or a broadcaster. The fact that members of the public may, or may not, view or listen to the performance at the same time that it is transmitted, as opposed to viewing or listening to it at a later time, is not determinative of whether the public performance right is implicated in the transmission, any more than it is in a situation in which television viewers do not watch a program at the time it is transmitted.

C. Consistent with existing law, Congress should make it clear that transmissions over computer networks that take place in compressed time, as well as those occurring in real time, can involve public performances of copyrighted works

The only palpable difference between a transmission over a computer network and a transmission over a broadcast or cable television network is that a television broadcast or satellite transmission is generally made in real time, while a transmission over a computer network is sometimes made in real time and sometimes made in a shorter (compressed) period of time. The fact that one transmission may be made in real time, while another may be made in a different time frame, should not affect the legal conclusion as to whether the public performance right is implicated. In this regard, in the context of broadcast or cable satellite transmissions, the network transmission (or "feed") to its affiliated stations or cable systems often occurs at a different time from when a particular station or cable operator transmits that programming to viewers. It is clear, however, that both such transmissions (*i.e.,* the network "feed" and the station's or cable operator's transmission to its viewers) constitute public performances which implicated the public performance right under copyright.

In *David* v. *Showtime/The Movie Channel, Inc.,* 697 F. Supp. 752 (S.D.N.Y. 1988), Showtime/The Movie Channel, Inc. ("Showtime") argued that since its satellite signals were transmitted to local cable operators for retransmission, rather than to the viewing public, its transmissions to cable systems did not violate the public performance right of the copyright owners of the works being transmitted. The court disagreed, and held that Showtime's transmissions to local cable operators did constitute "public performances" within the meaning of Section 106(4). The court determined, based on its review of the legislative history of the Copyright Act, that "the concept of 'public performance' should be interpreted broadly" and that *"Congress intended the definitions of 'public' and 'performance' to encompass each step in the*

[9] H.R. Rep. No. 94–1476, 94th Cong., 2d Sess. 63 (1976) ("House Report").
[10] House Report at 62 (emphasis added).
[11] *Id.* at 64–65 (emphasis added).

process by which a protected work wends its way to its audience."[12] In doing so, the court relied in part on the following language from the House Report: "Under the definitions of 'perform,' 'display,' 'publicly,' and 'transmit' in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public * * *"[13]

See also, Broadcast Music, Inc. v. *Hearst/ABC Viacom Entertainment Services,* 746 F. Supp. 320, 328–29 (S.D.N.Y. 1990) (court dismissed defense that transmissions of Lifetime cable network did not constitute public performances).

D. Consistent with existing law, Congress should make it clear that transmissions over computer networks where the recipient makes a copy of the content which is transmitted can involve public performances of copyrighted works

A related issue considered in connection with the White Paper is whether, if a user makes a copy of programming which is transmitted over a computer network, the transmission should be treated as a distribution, a performance, or both. SESAC submits that whether a user has the opportunity to make a copy of programming being transmitted, or whether the user in fact makes a copy of such programming, should not be determinative of whether a public performance takes place, any more than the availability of a video or audio tape recorder to record a television or radio program would be. SESAC believes that in such a situation, the public performance right is clearly implicated (whether or not the distribution right is implicated as well), as long as the performance is "public" in the sense that it is available to members of the public. As the court held in *On Command Video Corp.* v. *Columbia Pictures Industries,* 777 F. Supp. 787 (N.D. Cal. 1991) (with respect to a new system for viewing motion pictures in hotel rooms): *"[W]hether the number of hotel guests viewing an On Command transmission is one or one hundred, and whether these guests view the transmission simultaneously or sequentially, the transmission is still a public performance since it goes to members of the public."*[14]

See also Columbia Pictures Industries, Inc. v. *Redd Horne, Inc.,* 749 F.2d 154, 158–60 (3d Cir. 1984).[15]

In this regard, one analogy may be helpful. If a pay-per-view telecast is transmitted to subscribers of a cable system, the public performance right is clearly implicated. If a particular subscriber makes a copy of the programming contained in that pay-per-view transmission through use of a VCR, it would not transform the nature of the legal rights implicated from a public performance right to a distribution right. Clearly, there would be a public performance with respect to the user who made a videocassette copy, just as there would be with respect to another user who didn't.[16] SESAC submits that there is no logical rationale for reaching a different conclusion in the case of a transmission on a computer network.

SESAC recognizes that, to the extent new technologies such as computer networks may implicate different rights under copyright, it may become more complicated for networks, service providers and users to evaluate and license the appropriate rights. But the solution to this perceived problem is not to abrogate or subordinate one long-established right (the public performance right) and substitute or elevate another (the distribution right). The solution, rather, is to allow business practice, through the marketplace, to adapt to the new computer and online technologies, just as they have adapted to successive other "new" technologies in the past.

E. Congress should clarify, consistent with its approach in the Digital Performance Right in Sound Recordings Act of 1995, that the new transmission right is not intended to diminish or weaken in any way the Section 106(4) public performance right

To avoid ambiguity,[17] SESAC suggests that language be added to S. 1284 to clarify the intention of Congress that the new transmission right is not intended to di-

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[12] 697 F. Supp. at 758, 759 (emphasis added).

[13] *Id.* at 758, *quoting* House Report at 63.

[14] 777 F. Supp. at 790 (emphasis added).

[15] The latter two cases are cited in the White Paper at 71 n.222.

[16] Of course, there might also be a distribution and/or reproduction with respect to the user who made the videocassette copy. Under the 1976 Copyright Act, rights such as the public performance right, the distribution right and the reproduction right are viewed as additive and not mutually exclusive.

[17] While SESAC generally agrees with the conclusions of the White Paper, some ambiguity may be created by certain language at pages 217–18 and note 544 of the White Paper. That language refers, *inter alia,* to whether "the transmitter intends to transmit a performance of the work, as well as to distribute a reproduction of it" and whether "the transmitter intend[s] to communicate a performance or display of a work or, rather, to distribute a reproduction of the work." Ultimately the White Paper did not adopt the "primary purpose or effect" standard

minish or weaken in any way the Section 106(4) public performance right. This approach would be consistent with that of the Digital Performance Right in Sound Recordings Act of 1995, in which Congress explicitly provide that the new digital performance right in sound recordings was not intended to diminish in any respect royalties payable to copyright owners of musical works for the public performance of their works. The language of Section 114(i) of the Copyright Act, which was added by the Digital Performance Right in Sound Recordings Act, provides:

"(i) NO EFFECT ON ROYALTIES FOR UNDERLYING WORKS.—License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6)."

17 U.S.C. § 114(i). SESAC respectfully suggests that a similar clarification with respect to the new transmission right would further the purposes of S. 1284 and avoid ambiguity and potential legal disputes.

III. THE PUBLIC PERFORMANCE RIGHT IS OF PRIMARY IMPORTANCE TO SONGWRITERS

During the course of the proceedings that led to the issuance of the White Paper, numerous questions were raised as to the relative importance of the Section 106(4) public performance right as compared with other rights, in the context of real-world transactions in the entertainment industry. Among others, the following questions (which also relate to the issues before the Committee) were raised: how important is the public performance right to songwriters and music publishers, both in absolute terms and in relation to other rights (such as the distribution and reproduction rights)? Specifically, to what degree does a songwriter's livelihood depend on income from public performances of his or her musical compositions, as compared with income from mechanical or synchronization rights?

SESAC has conducted an analysis of these issues which we believe would be helpful to the Committee. SESAC wishes to emphasize, however, that the information provided herein is not based on proprietary information concerning SESAC's own affiliated songwriters and music publishers (nor is it based on any proprietary information involving writers and publishers affiliated with any other performing rights society), but rather is derived from generally available information contained in published books, articles, the trade press, and other reference materials.[18]

A. Songwriters are heavily dependent on income from public performance rights; in fact, they generally receive significantly more income from public performance rights than from other sources

The typical songwriter is not a "superstar" singer/songwriter like Bob Dylan or Neil Diamond. Most songwriters do not release commercial recordings of their songs and earn only a modest income from writing songs that are performed and recorded by others.

Songwriters derive income primarily from public performance rights, mechanical rights and synchronization rights.[19] The information summarized below demonstrates that songwriters generally derive a significantly greater proportion of their livelihood from public performance rights than from other sources. We will first examine "mechanical" rights and synchronization rights and will then compare the income derived by songwriters from the licensing of such rights with that arising from the licensing of public performance rights.

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suggested in the "Green Paper" (the Working Group's Preliminary Draft). Nonetheless, the foregoing language highlights the need for appropriate clarification of these issues.

[18] These books and reference materials include: Jeffrey Brabec & Todd Brabec, *Music, Money and Success: The Insider's Guide to the Music Industry* (1994) ("Brabec"); Jeffrey Brabec & Todd Brabec, *Movie Scores—Songs*, in *The Hollywood Reporter 1989 Film & TV Music Special Report* (1989); Donald C. Farber, *Entertainment Industry Contracts: Negotiating and Drafting Guide* (1995) ("Farber"); Mark Halloran, *The Musician's Business & Legal Guide* (1991); Mark Halloran & Thomas A. White, *Pop Soundtrack Music for Film*, in *1990 Entertainment, Publishing and the Arts Handbook* (1990); Al Kohn & Bob Kohn, *Kohn on Music Licensing* (1996) ("Kohn"); Donald S. Passman, *All You Need To Know About the Music Business* (1994); M. William Krasilovsky & Sidney Shemel, *This Business of Music* (1995) ("Krasilovsky"); and *Billboard* Magazine.

[19] Songwriters also derive some income from the exploitation of certain other rights in musical compositions (such as sheet music and other print rights) that are not directly affected by the issues presented in S. 1284 and are therefore not analyzed in these comments.

1. Mechanical rights; compulsory license

"Mechanical" rights refer to the right to reproduce songs in sound recordings. Once a sound recording of a musical composition has been made and distributed under the authority of the copyright owner of the song (generally the songwriter and/or the music publisher), Section 115 of the Copyright Act permits anyone else to make and distribute a sound recording of the same musical composition by obtaining a compulsory license and paying a statutory license fee.[20] Currently, that fee is 6.95 cents per song.[21]

Most rights in musical compositions have traditionally been administered by music publishing companies.[22] Income derived from the licensing or other disposition of rights in a song is traditionally divided into two "pots": the "publisher's share" (that portion of such income payable to the music publisher) and the "writer's share" (that portion of income payable to the songwriters of the song, collectively). By longstanding industry custom and practice, the writer's share and publisher's share each equal 50% of the revenues derived from the exploitation of rights in a song. Accordingly, for each $1.00 in income generated from the licensing of rights in a musical composition, 50 cents goes to the songwriters collectively and 50 cents goes to the music publisher or publishers.[23]

Different songs, of course, are written by different combinations of songwriters. Frequently two writers will writer a song together, with one writing solely or primarily the music and the other the lyrics. In other cases, multiple writers will collaborate on a song, while in other instances a single songwriter will write both music and lyrics.[24] Because it is typical for two songwriters to be involved in the creation of a song, the examples set forth below will generally assume that there are two songwriters.[25]

Without any deductions or offsets,[26] the mechanical income derived by a songwriter (where two writers have collaborated on a song) from the sale of a sound recording is 1.74 cents, or one-half of the writer's share of 3.48 cents.[27] Therefore, if a record sells 1 million copies, a songwriter of a musical composition contained on that record would earn approximately $17,400 from the sale of those records.[28]

The statutory rate acts as a maximum, or cap, on the mechanical license fee that is paid with respect to each record sold. Numerous factors can operate to reduce the income derived by songwriters below the statutory rate. For example, some prospective licensees of a song will be willing to pay only a fraction (*e.g.*, 75%) of the statu-

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[20] 17 U.S.C. § 115. Technically, the compulsory license relates to making and distributing "phonorecords", which are material objects in which sounds are fixed, 17 U.S.C. § 101. The statutory language in Section 115 expressly refers to the reproduction and distribution rights provided by Sections 106(1) and 106(3) of the Copyright Act, 17 U.S.C. §§ 106(1) and 106(3), being subject to complutory licensing. the Digital Performance Right in Sound Recordings Act of 1995 added to new Section 115(c)(3) relating to a compulsory license for distribution of phonorecords "by means of a digital transmission which constitutes a digital phonorecord delivery". *See* 17 U.S.C. § 115(c)(3).

[21] 37 C.F.R. § 255.3(h). This statutory license fee is for musical compositions up to five munutes in length or, if over five minutes, 1.3 cents per minute of playing time. The statutory rate was 6.6 cents until January 1, 1996, when the 6.95-cent rate took effect. *See* Cost of Living Adjustment of the Mechanical Royalty Rate, 60 Fed. Reg. 55,458 (Nov. 1, 1995).

[22] In early 1900's music publishers sought to generate revenue from songs through print publication of sheet music—hence the name "publishers". Today, music publishers engage in a wide variety of activities in an effort to generate revenue from songs, including seeking public performances, sound recordings, and usage of songs in motion picture and television productions, making arrangements for the publication and exploitation of songs in territories outside the United States, introducing songwriter to artists and producers, and arranging collaborations among writers.

[23] At the statutory rate of 6.95 cents for mechanical licenses, the writer's share and the publisher's share are each 3.48 cents (rounding all figures to two decimal places).

[24] In still other instances, songwriters will collaborate on the music and lyrics of a song, but will utilize preexisting material (such as an earlier version of a song or a version in a different language) or write new material (such as a new arrangement). In such cases, if the preexisting material is under copyright, an appropriate license or other grant of rights will need to be obtained (*e.g.*, a derivative work license under Section 106(2) of the Copyright Act), which will frequently result in multiple rights holders sharing the writer's share of income.

[25] An informal survey of the 75 songs on *Billboard* Magazine's country singles chart indicated that approximately three-fourths of the songs were written by two or more songwriters.

[26] See the discussion *infra* relating to controlled compositions clauses, mid-price and budget records, and other factors that operate to diminish the effective writer's share.

[27] Note that these figures apply to records sold and not returned. By longstanding industry custom and practice, retail outlets generally have the right to return unsold inventory to record companies for full credit.

[28] A very small proportion of records sells as many as 1 million copies, which is enough to be certified "gold" for a single and "platinum" for an album.

tory rate.[29] And if a songwriter is also a recording artist, the songwriter's effective mechanical income is likely to be diminished by the "controlled compositions" clause in his or her record contract. Such clauses generally provide, *inter alia,* that: (1) with respect to songs written, owned or controlled by the artist, in whole or in part, the record company will pay a mechanical royalty equal to only a percentage of the statutory rate (generally 75%); and (2) with respect to an album, the record company will not pay mechanical royalties that exceed the (reduced) mechanical rate applicable to 10 songs, even if there are more than 10 songs on the album. Accordingly, if a song is subject to a controlled compositions clause, the record company will pay a mechanical royalty amounting to a maximum of only approximately 5.21 cents per song (75% of 6.95 cents), with 2.61 cents being the respective writer's and publisher's shares, and 1.30 cents being the mechanical royalty derived by each songwriter (again assuming two writers).

Moreover, if an artist/songwriter subject to a controlled compositions clause co-writes, say, 5 songs on an album, and also performs 5 songs written by other writers, the record company may pay the full statutory rate for the 5 songs written by others. This means that the record company would pay 34.75 cents (5 times 6.95 cents) to the publishers of the other songs, leaving only 17.38 cents (the 52.13 cents which the record company will pay at a 75% rate, less 34.75 cents) in mechanical royalties for the 5 songs written by the artist/songwriter—which translates into an effective mechanical royalty of just 0.87 cents per song for each songwriter (assuming two writers). SESAC also notes that many songwriters write primarily background or theme music or other music contained in audiovisual productions, and therefore are unlikely to receive any significant mechanical rights income.

For these reasons, the potential for most songwriters to derive a significant amount of income from mechanical royalties is somewhat limited.[30]

2. Co-publishing agreements

Traditionally, and especially with newer songwriters without a significant track record, music publishers have retained the entire "publisher's share" (*i.e.,* 50% of the total income from the licensing of rights in a song). A "co-publishing agreement" refers to an arrangement in which a music publishing company which is owned or controlled by the songwriter receives a percentage of the publisher's share of revenue and, sometimes, shares responsibility for carrying out certain administrative functions of the music publisher. In general, publishers are more willing to enter into co-publishing agreements with songwriters who have a track record of commercially successful songs.

While the respective percentages vary, in those instances where a music publisher is willing to enter into a co-publishing agreement, a 50/50 arrangement is probably more common than any other.[31] In a 50/50 co-publishing arrangement, the songwriter's own music publishing company will receive 50% of the net publisher's share of income, while the other music publisher retains the remaining 50%. This is often referred to as a "75/25" split, since the writer and his own publishing company (if there were no deductions or offsets) would retain 75% of the total revenues (the 50% writer's share, plus an additional 25% as one-half of the publisher's share) while the other publisher would retain 25% (one-half of the publisher's share).[32]

3. Synchronization licenses

Synchronization (or "synch") licenses refer to the right to use a song in synchronization or timed relation with visual images. Pursuant to established industry custom and practice, the parties acquiring such rights (*e.g.,* television and motion picture producers) tend to pay a flat fee for a long-term license. For television or motion picture synchronization licenses, fees for long-term worldwide rights have been reported to range from several hundred dollars to $30,000 or more, depending on

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[29] This is frequently the case, for example, with respect to so-called "mid-price" or "budget" records (which have a lower than normal suggested retail list price) or for records that contain more than 10 songs.

[30] Even in the case of so-called "superstar" recording artists who also write their own songs, such artists generally derive far more income from their royalties as recording artists than from their mechanical royalties as songwriters.

[31] Some co-publishing arrangements start out with the songwriter having less than a 50% interest in the publishing (*e.g.,* 25%) with the opportunity to increase that interest (*e.g.,* to 50%) to the extent that he or she develops a commercial track record.

[32] In many such situations the other music publisher will be entitled to an administration fee ranging from approximately 10% to 25% of the publisher's share of revenues. This has the effect of lowering the percentage of total revenues derived by the songwriter (*e.g.,* if the administration fee is 20% of the publisher's share, the songwriter and his or her own publishing company will receive 65% of the total revenues and the other publisher will receive 35%).

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the type and duration of use.[33] A songwriter derives no additional income from the licensing of motion picture synchronization rights if the motion picture is a hit. Unlike with other creators, motion picture producers are generally unwilling to negotiate percentages of gross or net revenues with songwriters.

In the home video and multimedia areas, many video producers and multimedia publishers are insisting on buyouts of rights in musical compositions for a fixed fee and are resisting royalty or shorter-term arrangements.

All of the foregoing reinforces the need to protect the performance rights of songwriters on the information superhighway and the importance of preserving the distinct rights under copyright that enable songwriters to earn a livelihood.

4. Public performance income

Income from public performances constitutes, by far, the largest source of income for songwriters. Available statistics relating to the aggregate income derived by songwriters and music publishers demonstrate that performance rights revenues, on average, are approximately twice those of mechanical rights revenues.[34]

Various estimates have been given for the approximate ranges of public performance income that may be derived from particular types of performance of a song. It has been estimated, for example, that a song appearing on a national chart can earn anywhere from a few thousand dollars to well in excess of $300,000 in public performance income, depending on such factors as its rank and duration on the chart and whether its popularity is limited to a particular type or format of music or whether it appears on or "crosses over" into different formats (resulting in performances on different types of radio stations).[35] This compares with a total of $69,500 in mechanical royalties from a million-selling record[36] and demonstrates how important the public performance right is to songwriters.

Moreover, the income which songwriters derive from public performances is not subject to reduction by virtue of such factors as controlled compositions clauses. In addition, songwriters have traditionally received payments of the writer's share of performance rights income directly from the performance rights society with which they are affiliated. By contrast, the writer's share of mechanical royalties is paid to the music publishing company, which subsequently remits them to the songwriters (generally in a later accounting cycle).

The above figures demonstrate that the public performance right is of primary importance to songwriters. Any change in the law that would diminish or weaken the public performance right would have a severe detrimental impact on songwriters and their ability to earn a livelihood and, ultimately, on the creation of new music.

B. The importance of the public performance right is magnified by the fact that songwriters lack certain protections available to others in the entertainment industry

Songwriters do not enjoy certain protections available to many others in the entertainment industry and need to rely on the Section 106(4) public performance right to make up for this lack of protection in other areas. For example, union musicians, vocalists, screenwriters, directors, and performers are entitled to residual payments from repeated or ancillary uses of their creative contributions under applicable union and guild agreements.[37] Moreover, as is noted above, songwriters are subject to the compulsory license provisions of Section 115 of the Copyright Act for "mechanical" licenses and are unable to bargain for the fair market value of their songs when they are incorporated in sound recordings. In addition, songwriters rarely have the opportunity to benefit from certain ancillary sources of income, such as merchansdising and commercial tie-up rights, available to many others in the entertainment industry.

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[33] *See* Kohn, *supra* note 18, at 1408–09.

[34] *See Audio Week*, July 19, 1993 (an estimated $650 million in performing rights royalties collected and distributed in the U.S. by performing rights societies, as opposed to an estimated $350 million in mechanical royalties); Krasilovsky, *supra* note 18, at 192, 237.

[35] *See* Brabec, *supra* note 18, at 284. The above figures represent total performance income (writer's and publisher's shares combined) for the first year a song is on the charts. (Accordingly, the writer's share payable to each writer for a song with two songwriters would be one-fourth of the respective numbers.)

[36] The $69,500 figure represents the combined writer's and publishers shares, without taking into account controlled compositions clauses or other factors that diminish mechanical income.

[37] These agreements include those involving such labor organizations as the American Federation of Musicians (A.F. of M.), the Screen Actors Guild (SAG), the American Federation of Television and Radio Artists (AFTRA), the Writers Guild of America (WGA), and the Directors Guild of America (DGA).

IV. CONCLUSION

SESAC believes that the foregoing facts clearly demonstrate the paramount importance of the public performance right to songwriters and music publishers. SESAC respectfully recommends that language be added to S. 1284 to clarify that the proposed new transmission right is not intended to diminish or weaken in any respect the Section 106(4) public performance right. Without such clarification, SESAC is concerned that the rights and interests of songwriters and music publishers could be seriously eroded.

SESAC appreciates the opportunity to present its comments and would be happy to further assist the Committee in its efforts to enact S. 1284, and to provide any additional information that may be helpful.

Respectfully submitted,

KENNETH M. KAUFMAN,
Roberts & Eckard, P.C., Counsel to SESAC, Inc.,
SESAC, Inc.

MAGAZINE PUBLISHERS OF AMERICA,
May 17, 1996.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, Washington, DC.

Re: S. 1284, the National Information Infrastructure Copyright Protection Act

DEAR MR. CHAIRMAN: The Magazine Publishers of America ("MPA"), the national trade association of the nation's consumer magazine industry, submits the following comments to the Committee on the Judiciary and asks for their inclusion in the official record of the Committee's proceedings on the above-referenced matter. We speak for a membership of about 200 domestic companies that publish approximately 800 consumer interest magazines. Titles published by MPA members range from such large and well-known national publications as Reader's Digest, Newsweek, and National Geographic to smaller, specialty and regional publications such as WordPerfect, Highlights for Children, and Cross Country Skier. Over 300 million subscriptions to consumer magazines are sold annually, with consumers receiving nearly 6 billion copies of those magazines.

MPA welcomes the opportunity to submit comments on this critically important legislation. Although magazines may be thought of as a traditional print medium, our members' publications—and their readers—have a very large stake in the successful growth of the National Information Infrastructure ("NII"). MPA is a founding member of, and active participant in, the Creative Incentive Coalition ("CIC), which has presented testimony to you under its aegis. MPA commends CIC's testimony to you and endorses it fully. Our purpose here is to supplement CIC's presentation by summarizing MPA's position for the record, and by alerting you to the importance of this legislation to our industry.

S. 1284 SHOULD BE ENACTED

MPA acknowledges the outstanding effort made by the Committee and its staff to give full and fair consideration to all views on this legislation. Our position is unequivocal. MPA strongly supports the enactment of S. 1284 at the earliest practicable date. The bill's minimalist approach is sound public policy, ensuring the application of the time-tested principles of American copyright law to the digital environment, maintaining the essential balance of rights among parties at interest, and guaranteeing the healthy growth of this exciting new medium for the benefit of all who use it—now and in the decades to come.

MPA agrees wholeheartedly with the fundamental premise of S. 1284: if the NII is to grow and flourish, intellectual property distributed by means of the NII must be protected. Without this protection, copyright owners—both individual and corporate—simply will not make use of the NII. The technology of the NII, its brain, is truly wondrous; but the heart of the NII will be its content. Without adequate protection for that heart, the NII never will reach its full potential. The relatively minor amendments to the copyright law which would be made by S. 1284 would ensure this protection.

S. 1284 SIGNIFICANTLY AFFECTS THE MAGAZINE INDUSTRY

The consumer segment of interactive media is growing at a dramatic rate. The number of homes equipped with computers is estimated to have reached 34 million at the end of 1995. An estimated thirty percent of these are modem-equipped and

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sufficiently advanced technologically to gain access to the NII. By 1999, this number is expected to rise to 44.3 million, fifty percent of which will be model-equipped, representing forty-four percent of all of our nation's households. Already, there are hundreds of "conventional" magazines available on commercial online services and on the World Wide Web, and the number is growing constantly. The increasing availability of magazines online impels our strong support for early enactment of S. 1284, especially with regard to the provision of the bill which makes it clear, beyond doubt or dispute, that copyright owners have the exclusive right to distribute copies of their works by transmission over computer networks, even if no physical copy of the work (for example, a magazine) changes hands.

As even the current statistics about conventional publications going "online" demonstrate, magazines do not fear the growth of digital media; to the contrary, our members are excited by the potential for new readership. MPA and its members view the NII as a new media form which makes available an additional means of distributing our magazines and disseminating their content. "New media" complements and supplements our traditional print form. Magazines have been published in this country for over 250 years. We view the NII not as a threat to be quashed, but as a dynamic new way to publish, whose growth we wish to ensure.

Also at stake in the S. 1284 debate, yet often unspoken, is the societal benefit of the NII. From our perspective, included in this societal benefit is the potential for the enhanced distribution of the publications of a free, healthy, and robust press. The NII truly has the potential to become the "Town Hall" of the twenty-first century. The opportunity of instantaneous, interactive access to a universe of editorial, commercial, and artistic material is unprecedented. The importance of copyright protection here cannot be understated. Without adequate protection for the works that will race along the "Information Superhighway", writers, journalists, authors, and photographers—as well as publishers—will be deterred from making those works available on the NII. An NII without rules will become merely a forum for the posting of stolen material, inaccurate information, or questionable data. The application of fundamental copyright principles to the NII is not merely in the economic interest of copyright owners, we submit; it is in our societal, governmental, and commercial interest as a nation. If the full potential of the NII is to be attained, for everyone's benefit, Congress must guarantee basic copyright protection to content providers.

MPA appreciates the opportunity to comment on S. 1284, through both the testimony of the Creative Incentive Coalition and this statement. If we may provide additional information or commentary, or appropriately assist the Committee in its deliberations in any way, we would be pleased to do so.

Respectfully submitted,

JAMES R. CREGAN,
Senior Vice President / Counsel.

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